Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW J. RYAN, ROBERT C. JUBELIRER, JESS M. STAIRS and JAMES J. RHOADES,

Petitioners,

vs.

DAVID POWELL, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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SEPTEMBER 24, 1999

QUESTIONS PRESENTED

1. Whether a federal agency's regulation prohibiting unintentional disparate impacts as to race or ethnicity in state programs receiving federal funds exceeds the statutory authority of the agency, which is limited to promulgating regulations that "effectuate the provisions of" Section 601 of Title VI of the Civil Rights Act of 1964, which prohibits only intentional discrimination.

2 Whether Congress intended to allow plaintiffs to bypass federal agencies and to bring private actions to enforce disparate-impact regulations promulgated under Section 602 of Title VI of the Civil Rights Act of 1964.

3. Whether an alleged injury to plaintiffs is traceable or redressable for purposes of standing under Article III of the Constitution, where plaintiffs complain about unequal state subsidies to local school districts, but where the plaintiffs' own school district can offset any increase in the state subsidy by a reduction in its own share of spending.

LIST OF PARTIES

Petitioners are officers of the General Assembly of the Commonwealth of Pennsylvania: Matthew J. Ryan, Speaker of the House of Representatives; Robert C. Jubelirer, President *pro tempore* of the Senate; Jess M. Stairs, Chairman of the House Education Committee; and James J. Rhoades, Chairman of the Senate Education Committee (the "Legislative Parties"). The Rep. Stairs and Sen. Rhoades are also *ex officio* members of the State Board of Education. Petitioners intervened in district court in support of the defendants and were appellees in the Third Circuit. Respondents who were defendants in district court and appellees in the court of appeals are executive-branch officers of the Commonwealth: Thomas J. Ridge, Governor; James P. Gallagher, Chairman of the State Board of Education); Eugene W. Hickok, Secretary of Education; Barbara Hafer, Treasurer (the "Executive Parties"). Respondents who were plaintiffs in district court and appellants in the court of appeals include the following: the City of Philadelphia and its Mayor, Edward G. Rendell; the School District of Philadelphia, its Superintendent, David W. Hornbeck, its Board of Education and the President of the Board, Floyd W. Alston; David Powell; Shelean Parks; Patrice Everage; Julia A. Davis; Yvette Bland; Geraldine Newton; Maria M. Rivera; Mary E. Miller; Gregory Luzak; Catherine Luzak; Fu Zhen Xie; The Black Clergy of Philadelphia and Vicinity; Philadelphia Branch NAACP; ASPIRA, Inc., of Pennsylvania; Parents Union for Public Schools; Citizens Committee On Public Education In Philadelphia; Parents United for Better Schools, Inc., Respondent, the Philadelphia Federation of Teachers, intervened as a plaintiff in district court and was an appellee in the court of appeals.

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Petitioners respectfully request that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Third Circuit in *Powell* v *Ridge*, 98-2096 (Appendix A at 1a), is not yet published in the Federal Reporter 3d but is reported online at 1999 U.S. App. LEXIS 20092 and 1999 WL 643364. The decision of the U.S. District Court for the Eastern District of Pennsylvania in *Powell* v *Ridge*, No. 98-1223 is not reported (Appendix B at 35a).

JURISDICTION

This petition is filed within 90 days after the court of appeals entered its judgment on August 25, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1). The constitutionality of a statute is not at issue.

STATUTORY PROVISIONS INVOLVED

The federal statutory and regulatory provisions involved include the following: Sections 602 and 603 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d and 2000d-1, 34 C.F.R. § 100.3, 34 C.F.R. § 100.7 and 24 PA. STAT. ANN. § 2502.35 (Appendices C, D, E, F and G at 65a, 66a, 68a, 73a and 75a). The state and local expenditures at issue are established by state statute or local ordinance.

STATEMENT OF THE CASE

A. Factual Background

Philadelphia's School District is the largest of the 501 public school districts in the Commonwealth of Pennsylvania, with 12 per cent of all public school students in the Commonwealth.[1] The School District has three principal sources of revenue: local taxes, subsidies from the Commonwealth and federal grants.[2] The School District obtains approximately half of its overall operating budget from local tax revenues. The remainder of its revenue consists of Commonwealth subsidies and federal grants.[3]

The Commonwealth's basic education subsidy for its public schools is determined through a statutory formula established by the Pennsylvania General Assembly.[4] For the 1997-1998 school year, the state subsidy for each school district was the amount received for the previous

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[1] The facts in this petition are taken from the complaint and from legislative enactments, such as state and local appropriations and budget measures. They have not been included in the appendix, because of their length.

[2] Public school funding mechanisms in Pennsylvania are established by statute. The funding mechanisms are also described generally in state-court decisions. *See, e.g., Danson* v *Casey*, 399 A.2d 360 (Pa. 1979).

[3] *See 1997/1998 Budget Reports of Revenue and Expenditure Data for the Philadelphia School District* (submitted to the Pennsylvania Department of Education on September 11, 1997) (showing estimated revenue for the 1997-98 school year of $1,521,725,429, only $606,209,000 of which came from the Commonwealth).

[4] 24 PA. STAT. ANN. § 25-2502.35 (reprinted in Appendix G).

year plus a "base supplement" that considered a school district's taxable real property and personal income, a "growth supplement" and a "poverty supplement" determined by the number of children in low-income families residing in the district.[5] The formula results in school districts receiving varying levels of state subsidy per student, rather than a flat amount per district or per student.[6] However, the formula is facially neutral with regard to race and ethnicity.

Philadelphia, like every school district, is not obligated to match the state subsidy with local spending. Philadelphia may increase or lower its own spending on public schools without regard to the state subsidy. If it were to receive an increase in its state subsidy, Philadelphia would have the discretion to lower its own spending on its public schools by an equal amount or more.

Plaintiffs alleged two causes of action. The first count was based on a regulation promulgated by the federal Department of Education under Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1. The regulation prohibits a recipient of federal funds from administering a program in a manner that has a disparate impact on a racial or ethnic basis, even if the impact is inadvertent.[7] The regulation does not state any grounds

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[5] The state appropriation to school districts for basic education in FY 1998-1999 was $3.5 billion. General Appropriation Act of 1998, Act No. 1998-6A.

[6] Philadelphia, for example, has 12 per cent of the Commonwealth's public school children yet receives about 18 per cent of the total state subsidy for basic education. *Supra* note 3. If the subsidy were given on a flat, per-student basis, Philadelphia would obviously get less.

[7] Appendix E at 69a.

upon which such disparate impact may be excused or justified. The second count alleged a violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983, based on the purported violation of the regulation.

Plaintiffs alleged that the total funding of the Philadelphia School District, from all sources, was substantially less per student than in some suburban school districts. Because a majority of Philadelphia's public school children are non-white and a majority of the students in the suburban districts are white, the complaint alleged that there was an actionable disparate impact under the agency regulation. Additionally, the complaint alleged that, among an unspecified number of school districts around the state with comparable levels of student poverty, those with large non-white student bodies received less Commonwealth subsidy per student than those with largely white student bodies.

Although the complaint selectively used statistics, the complaint did not compare Philadelphia with all school districts in the state, either as to per-student state subsidies or as to total per-student revenue from all sources. The complaint also did not compare Philadelphia with other school districts that have not just a similar level of student poverty but also a similar level of locally-taxable real property and personal income.

B. Proceedings Below

The action commenced on March 9, 1998, in the United States District Court for the Eastern District of Pennsylvania. Both the Executive Parties and the intervening Legislative Parties filed dispositive motions under FED. R. CIV P. 12.

Shortly thereafter, this Court summarily disposed of *Seif* v *Chester Residents Concerned for Quality Living*, No. 97-1620, vacating the judgment of the Third Circuit on a suggestion of mootness. 119 S.Ct. 22 (1998). In *Chester Residents*, the Third Circuit had found an implied private right of action to enforce disparate-impact regulations promulgated by federal agencies under Section 602 of Title VI, 42 U.S.C. § 2000d-1. 132 F.3d 925 (CA3 1997).

The defendants in this case filed supplemental motions in the district court raising the same issue as in *Chester Residents*.

The district court found the Third Circuit's vacated holding in *Chester Residents* persuasive and held that Title VI regulations could give rise to private actions. (Appendix B at 61a-62a). However, the district court held that the complaint failed to state a claim of disparate impact and that the complaint failed to state a claim under Section 1983 because none of the defendants were "persons" for purposes of that statute. (Appendix B at 44a-45a).

Plaintiffs appealed to the Third Circuit, which reversed the district court and refused to affirm on alternate grounds urged by the appellees. (Appendix A at 1a). It held that the disparate-impact regulations were valid, that there was an implied private right of action, that all plaintiffs had standing and that the complaint stated a claim. It also held that an action under Section 1983 could be maintained for violation of the regulation.

REASONS FOR GRANTING THE PETITION

I. WHETHER A REGULATION MAY PROHIBIT UNINTENTIONAL DISPARATE IMPACTS WHEN THE UNDERLYING STATUTE PROHIBITS ONLY INTENTIONAL DISCRIMINATION IS AN IMPORTANT ISSUE AND THE THIRD CIRCUIT'S CONCLUSION IS INCONSISTENT WITH RECENT AUTHORITY OF THIS COURT.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et al.*, prohibits only *intentional* racial or ethnic discrimination by recipients of federal funding. *University of California Regents* v *Bakke*, 438 U.S. 265 (1978); *Guardians Association.* v *Civil Service Commission of New York City*, 463 U.S. 582, 607-08 (1983) (opinion of Powell, J., in which Burger, C. J., and Rehnquist, J., joined); 463 U.S. at 612 (opinion of O'Connor, J.); 463 U.S. at 634 (opinion of Stevens, J., in which Brennan and Blackmun, JJ., joined). Section 602 of Title VI authorizes regulations "to effectuate the provisions" of Section 601.

Regulations must be within the scope of the statutory delegation to the agency. In *Central Bank of Denver, N.A.* v *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), for example, the Court held that a private plaintiff could not bring a claim under Rule 10b-5, 17 C.F.R. § 240.10b-5, for conduct that would not be prohibited by the enabling statute, Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. § 78j. 511 U.S. at 173.[8] In *Ernst & Ernst* v *Hochfelder*, 425 U.S. 185

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[8] A part of the holding in *Central Bank* that is not material here was superseded by statute. *See* Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (1995).

(1976), the Court held that, because the enabling statute required proof of scienter to impose liability, a regulation could not permissibly impose liability based only on proof of negligence.

Yet despite *Bakke*, *Guardians* and the scope of Title VI, more than 40 federal agencies have promulgated regulations – purportedly under the authority of Title VI – that prohibit unintentional disparate impacts on racial or ethnic groups. See *Alexander* v *Choate*, 469 U.S. 287, 294 (1985). Those regulations affect virtually every part of our society. *See, e.g., Powell* (education funding); *Chester Residents*, 132 F.3d 925 (environmental permitting); *New York Urban League* v *New York*, 71 F.3d 1031 (CA2 1995) (mass-transit fares); *Ferguson* v *Charleston*, No. No. 97-2512, 1999 U.S. App. LEXIS 15611 (CA4 July 13, 1999) (drug testing); *Villanueva* v *Carere*, 85 F.3d 481 (CA10 1996) (transfer of students to charter school); *City of Chicago* v *Lindley*, 66 F.3d 819 (CA7 1995) (health care for the elderly); *David K.* v *Lane*, 839 F.2d 1265 (CA7 1988) (prison rules); *Larry P.* v *Riles*, 793 F.2d 969 (CA9 1984) (IQ testing); *Sandoval* v *Hagan*, 7 F.Supp.2d 1234 (M.D. Ala. 1998) (driver licensing); and *Bryant* v *New Jersey Dep't. of Transportation*, No. 97-1397, 1998 U.S. Dist. LEXIS 1847 (D.N.J. Feb. 17, 1998) (highway siting).

In *Guardians*, the Court touched on, but did not resolve, the question of whether Title VI disparate-impact regulations are valid given that the underlying statute bars only intentional discrimination. Justice O'Connor wrote in her concurrence that

> [i]f, as five Members of the Court concluded in *Bakke*, the purpose of Title VI is to proscribe only purposeful discrimination in a program receiving federal financial assistance, it is difficult to fathom how the Court could uphold administrative regulations that would proscribe conduct by the recipient having only a discriminatory effect. Such regulations do not simply "further" the purpose of Title VI; they go well beyond that purpose.

463 U.S. at 613 (O'Connor, J., concurring). The importance of Justice O'Connor's concern is highlighted by the fact that, since *Guardians,* plaintiffs have often made disparate-impact claims under Title VI regulations that they could not have made under the statute itself, a fact made plain by the list of cases on the preceding page.

The Third Circuit misinterpreted *Guardians* to hold that such disparate-impact regulations are valid. (Appendix A at 22a). While it is true that five Justices suggested in *Guardians* that such regulations could be valid, there was no *holding* to that effect. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds....'" *Marks* v *United States,* 430 U.S. 188, 193 (1977) (citation omitted). Of the five Justices in *Guardians* who opined that Title VI regulations could prohibit disparate impacts, four were in dissent (Marshall, Stevens, Brennan and Blackmun, JJ). Contrary to the Third Circuit's contention in this case, *Guardians* did not hold

that disparate-impact regulations are valid and, in fact, this Court has never reached that conclusion.[9]

There is only one decision by this Court that could be read to ratify disparate-impact claims under Title VI: *Lau* v *Nichols,* 414 U.S. 563 (1974). However, as several concurring Justices noted in *Guardians,* to the extent *Lau* included such a holding, it was implicitly overruled by *Bakke*. *See Guardians,* 463 U.S. at 611 n.4 (opinion of Powell, J., concurring in the judgment and joined by Burger, C.J., and Rehnquist, J.) and 463 U.S. at 615 (opinion of O'Connor, J., concurring in the judgment).[10]

This case presents the Court with an opportunity to make explicit what *Bakke* made implicit: *Lau* is no longer good law. Moreover, the Court has never passed on the validity of any of the more than three dozen disparate-impact regulations promulgated under the authority of Title VI. Because these regulations are increasingly the bases for private actions in the federal courts, the Court should take

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[9] Part of the confusion arises from dictum in Justice Marshall's opinion in *Alexander* v *Choate*, 469 U.S. 287, 293 (1985), in which he wrote that *Guardians* "held" that the regulations could prohibit disparate impacts. In the context of *Alexander*, his statement was dictum. Moreover, it was a mistaken characterization of another case, rather than a holding or dictum arising from *Alexander* itself.

[10] In *Lau,* Justice Douglas used regulations as a guide to conclude that a disparate impact could violate Title VI itself. 414 U.S. at 566 ("We do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, to reverse the Court of Appeals."). *Bakke*'s holding that the statute only reaches intentional discrimination undercut the basis for the *Lau* decision.

this occasion to resolve that which has generated so much confusion in the 16 years since it decided *Guardians*.[11]

II. THE COURT SHOULD DECIDE WHETHER PLAINTIFFS CAN BYPASS THE FEDERAL AGENCY THAT OVERSEES A SPENDING PROGRAM AND ASSERT A PRIVATE CAUSE OF ACTION UNDER "DISPARATE-IMPACT" REGULATIONS.

A. It is a question of national importance that affects innumerable federal, state and local programs.

This case presents the same question on which the Court issued a writ of *certiorari* to the Third Circuit in *Seif* v *Chester Residents Concerned for Quality Living*, 118 S.Ct. 2296 (1998). On August 17, 1998, the Court acted on a suggestion of mootness and dismissed that case. 119 S.Ct. 22 (1998). The petition in *Chester Residents* framed the issue as follows:

> Did Congress intend to create a private cause of action in federal court that bypasses a federal agency's review and enforcement process under Section 602 of Title VI of the Civil Rights Act of 1964, simply by alleging a discriminatory effect in the administration of programs and activities of a federally-funded State or local agency?

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[11] In the years since *Guardians*, plaintiffs have filed dozens of private actions in the federal courts based on Title VI disparate-impact regulations. Some of the more prominent cases are listed on Page 7, *supra*.

This case presents both the same issue and the same result in the court of appeals as in *Chester Residents*. All of the reasons underlying the Court's decision to accept review in that case apply with equal force in this case.

The preceding section of this petition describes the broad spectrum of areas affected by Title VI disparate-impact regulations, from education to the environment to highway siting to drug testing to drivers' licensing. However, this Court has yet to pass on the validity of those regulations or whether they may give rise to private actions.

The Court decided to provide guidance in *Chester Residents* but was unable to do so. When the question arises in environmental and other regulatory siting programs, it will often escape review, because the applicant, when faced with expensive delay, may be able to withdraw the project from consideration and go to another locality. This case presents no such threat of mootness, a fact made plain by the lengthy litigation in Pennsylvania state courts regarding funding for the Philadelphia schools. *See, e.g., Danson* v *Casey*, 399 A.2d 360 (Pa. 1979). The Court should settle this significant legal issue.[12]

This case also has national importance in another dimension. If plaintiffs can bring suits such as this, the

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[12] This case and *Chester Residents* present the only circuit-court cases to analyze the issue of whether to imply a private action under Title VI regulations. The remaining cases seem to assume, without deciding, that there is a private right of action. *See, e.g., Castenada by Castenada* v *Pickard*, 781 F.2d 456 (CA5 1986); *Buchanan* v *City of Bolivar, Tenn.*, 99 F.3d 1352 (CA6 1996); *David K.*, 839 F.2d 1265; *Larry P.*, 793 F.2d 969; and *Georgia State Conference of Branches of NAACP v Georgia*, 775 F.2d 1403 (CA11 1985).

States will be unable to subsidize public education, or to spend for other social welfare purposes, on anything other than a flat per-person basis without being besieged by litigation in the federal courts.

Like Pennsylvania, most States use multi-part formulas to determine how much funding to distribute to school districts. *See, e.g., Serrano* v *Priest,* 557 P.2d 929, 933 (Ca. 1977) (California); *Committee for Educational Rights* v *Edgar,* 672 N.E.2d 1178, 1180-81 (Ill. 1996) (Illinois); *Bismarck Public School District #1* v *North Dakota,* 511 N.W.2d 247, 252 (N.D. 1994) (North Dakota); and *Brigham* v *Vermont,* 692 A.2d 384, 387 (Vt. 1997) (Vermont). Yet any formula that provides funding on other than a strictly per-student basis is likely to have a statistical "disparate impact" for or against some racial or ethnic group in any State that is not completely homogeneous.

For example, to the extent Pennsylvania's formula considers local taxing potential, the affluent, and largely white, suburban districts must get less per-student from the Commonwealth than Philadelphia. Under the precedent established by the Third Circuit, those suburban districts would have an actionable claim of "disparate impact," because the regulations do not apply only to minorities. They apply to everyone – since we all have a race, color or national origin – who could show a statistical disparity on that basis. The Commonwealth would find itself frustrated in attempting to consider disparate needs that range from those of small rural school districts in its poor Appalachian counties to those of its large urban school districts, which can combine high-value taxable commercial realty and high personal income with inner-city poverty. If the Third Circuit's decision stands, the Commonwealth faces potentially 500 more federal lawsuits filed by school

districts *other* than Philadelphia. Other States will be similarly affected.

The agency regulation at issue in this case provides no guidance as to how to resolve the tension between its facial, blanket prohibition on disparate impact and the many disparate needs that the States must consider in structuring their programs. This might not in itself be a problem as long as the agency were the only party with standing to question the conduct of the recipients of its funding. The agency could examine the circumstances of any important case, articulate its policy considerations and exercise its discretion to seek changes in the way its money is spent or to cancel the funding entirely.

The precedent established by the Third Circuit invites myriad private suits, which the courts will have to decide without agency expertise to guide their deliberations. Not surprisingly, the Third Circuit's decision in *Chester Residents* was regarded by many as a call to litigation.[13] With the *vacatur* of *Chester Residents*, this case is now the only circuit case to explicitly hold that private plaintiffs may enforce Section 602 disparate-impact regulations.

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[13] *See, e.g.*, Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1 (1999); Jimmy White, *Environmental Justice: Is Disparate Impact Enough?*, 50 MERCER L. REV. 1155 (1999); Amanda C.L. Vig, *Using Title VI to Salvage Civil Rights from Waste:* Chester Residents Concerned for Quality Living v. Seif, *132 F.3d 925*, 67 U. CIN. L. REV. 907 (1999); and R. Gregory Roberts, *Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement*, 48 AM. U. L. REV. 229 (1998).

Accordingly, this case is likely to take *Chester Residents*' place as the foundation for such private actions nationwide. The outcomes in those cases are quite likely to be at variance with what the agencies would do if they exercised their primary jurisdiction. Because the regulation applies to disparate impacts on all races and ethnic groups, not just to impacts on members of minority groups, the Third Circuit's approach is more likely to harm members of minority groups than it is to help them in education and social welfare programs.

B. Courts of appeals have used different tests to find an implied private right of action in agency regulations.

The Court has not yet provided a mode of analysis for determining when to find an implied private right of action to enforce a regulation.[14] Without that guidance, the courts of appeals have adopted a variety of tests that consider materially different factors.

In this case, the Third Circuit used the test it developed in *Angelastro* v *Prudential-Bache Securities*, 764 F.2d 939 (CA3 1985), for determining whether to infer the existence of a private right of action to enforce a regulation. (Appendix A at 16a). The elements of the *Angelastro* test are: (1) whether the statute under which the regulation was promulgated could itself engender a private action; (2) whether the agency rule is properly within the scope of the enabling statute; and (3) whether implying a

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[14] *See* Gilbert Paul Carrasco, *Public Wrongs, Private Rights: Private Attorneys General for Civil Rights*, 9 VILL. ENVTL. L.J. 321, 323 n.10 (1998) ("To date, the Supreme Court has not articulated a specific test.").

private right of action will further the purposes of the enabling statute.

The Second Circuit has also adopted a three-pronged test developed by one of its district courts, but the prongs are materially different than those in the Third Circuit's test. *Drake* v *Delta Air Lines, Inc.*, 147 F.3d 169 (CA2 1998), looked at (1) whether the enabling statute was silent with respect to the existence of a private right of action to enforce the regulations; (2) whether there was an administrative enforcement mechanism in place to address alleged violations of the regulations; and (3) whether rights were created in the statute for a specific class of persons.[15]

The Ninth Circuit has a two-part test for determining whether regulations give rise to a private right of action: (1) whether Congress delegated authority to establish rules implying a private right of action; and (2) whether the rule in question was drafted such that a private right of action is legitimately implied. *See Robertson* v *Dean Witter Reynolds*, 749 F.2d 530, 536 (CA9 1984).

The Fifth Circuit has merely used the four-part test of *Cort* v *Ash*, 422 U.S. 66 (1975). Its decision in *Lowrey* v *Texas A&M University System*, 117 F.3d 242 (CA5 1997), assumes that the factors for inferring a private right of action in a regulation are the same as those for a statute.

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[15] The Second Circuit adopted the district court's analysis, affirming the refusal to find a private right of action under the Federal Aviation Administration's drug-testing regulations. *Drake*, 147 F.3d at 170. The Second Circuit noted "that Drake could have sought redress of the alleged regulatory violations through administrative avenues, such as by filing a complaint with the Secretary of Transportation." *Id.* at 171.

The courts of appeals have all developed their tests either by analogizing to *Cort* or, as in the Fifth Circuit, by simply applying *Cort* without regard to any inherent distinctions between the lawmaking and rulemaking functions. However, despite all having started with *Cort*, they have diverged in a material way. The Third, Fifth and Ninth Circuits seem to give no weight whatsoever to the existence of administrative avenues for resolving a complaint.

For example, in this case, the Third Circuit's opinion does not mention the existence of an administrative process, yet the statute that authorizes regulations also makes it a predicate for taking action that the "agency concerned has advised [the recipient] of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 42 U.S.C. § 2000d-1 (Appendix D at 67a). Likewise the agency regulations applicable to this case authorize the filing of an administrative complaint against a recipient of federal funds. 34 C.F.R. § 100.7(b) (Appendix G at 73a).

By contrast, the Second Circuit's approach would give great weight to the availability of such administrative avenues.

In overlooking the availability of administrative avenues for complaint resolution, the Third, Fifth and Ninth Circuits place no value on the principle of primary jurisdiction. As this Court noted in *Atchison, Topeka & Sante Fe Railway Co.* v *Wichita Board of Trade*, 412 U.S. 800, 820-21 (1973), a transportation-rate case, "National transportation policy reflects many often-competing interests. Congress has established an administrative agency that has developed a close understanding of the

various interests and that may draw upon its experience to illuminate, for the courts, the play of those interests in a particular case." 412 U.S. at 820-21. Agencies, moreover, often must apply two or more statutes simultaneously, to achieve multiple program objectives. This is such a case, since Section 602 of Title VI, while authorizing regulations, requires that they "be consistent with achievement of the objectives of the statute authorizing the financial assistance." 42 U.S.C. § 2000d-1 (Appendix D at 66a).

Petitioners do not here suggest the proper test for finding an implied right of action in agency regulations. Petitioners do suggest that the bypassing of the administrative process that can result from it is an important issue that should be addressed by the Court.

C. The Third Circuit erred in determining that disparate-impact regulations under Title VI could support private actions.

1. The court of appeals looked to the wrong enabling statute.

The Third-Circuit panel in *Chester Residents* examined the first *Angelastro* element by employing the test set out by this Court in *Cort*, and examining Section 602 of the Civil Rights Act. The panel in this case largely ignored that analysis. Instead, it concluded that the "enabling statute" was not Section 602 but Section 601 (Appendix A at 20a). The court then pointed to this Court's authority, and its own, for the proposition that Section 601 of Title VI gives rise to a private right of action. *Id.* With that machination, the court concluded that the first step of the *Angelastro* test was met. It then

summarily noted that "[w]e are persuaded by the analyses in *Chester Residents* that the second and third prong[s] of *Angelastro* are also met." (Appendix A at 20a).

The Third Circuit's analysis looked to the wrong "enabling statute." Had it looked to the correct provision – Section 602 – and applied the *Cort* test to that provision, the court would have reached a different result. Instead, the court of appeals erroneously determined that Section 601 is the statute that enables agencies to promulgate regulations. The flaw in that reasoning is evident in the plain language of the provision. Nothing in Section 601 hints even remotely at authorizing or directing agencies to do anything at all (Appendix C at 65a). Section 602, on the other hand, explicitly mandates agency action. *See* 42 U.S.C. § 2000d-1 ("Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed . . .") (Appendix D at 66a). Section 601 does not enable agencies to do anything – Section 602 does.[16]

The Third Circuit's response to that plain language was to conflate the two provisions: "As noted above, the regulation at issue here, although promulgated by the Department of Education under section 602 of Title VI, implements section 601 of Title VI." (Appendix A at 20a).

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[16] In analyzing statutes for an implied private right of action, this Court has treated different sections of the same statute differently. *Transamerica Mortgage Advisors* v *Lewis*, 444 U.S. 11, 19 (1979) (Court found that Section 215 of the Investment Advisers Act of 1940 gave rise to private actions while Section 206 of the same act did not.).

It is inappropriate to conclude that the implied right of action in Section 601 can be imported into Section 602. This Court has held that Section 601 reaches only ***purposeful*** discrimination. *Bakke*, 438 U.S. at 287. Accordingly, any private right of action implied in Section 601 relates only to claims of intentional discrimination. The regulation at issue in this case proscribes unintentional policies that result in disparate impacts and, so, Section 601's implied private action is a poor – and inappropriate – fit.

In fact, the Third Circuit erred in this case by not applying the *Cort* analysis to Section 602. *Cort* asks (1) whether the plaintiffs are part of the class for whose "especial" benefit the statute was created; (2) whether there was any indication of congressional intent to deny or create a private remedy; (3) whether the implication of a private remedy is consistent with the underlying purpose of the statute; and (4) whether the matter is one traditionally relegated to the states. 422 U.S. at 78. The second issue, legislative intent, is to be given the greatest weight. *Touche Ross & Co.* v *Redington*, 442 U.S. 560, 575 (1979). In *Thompson* v *Thompson*, 484 U.S. 174 (1988), the Court explained that "[t]he intent of Congress remains the ultimate issue, however, and 'unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.'" 484 U.S. at 179 (quotation omitted).

As noted above, there is nothing in the language or structure of Section 602 that suggests that Congress intended for there to be private actions to enforce the regulations described in that section. Indeed, the only remedy described expressly in Section 602 is a termination

of a wrongdoer's federal funding by the promulgating agency (Appendix D at 66a). "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Lewis*, 444 U.S. at 19.

The legislative history of Section 602 – which the Third Circuit ignored – bolsters this conclusion. There is nothing in that history to suggest that Congress intended, or even contemplated, that private persons would file lawsuits predicated on regulations and there is much that points to the contrary. *Touche*, 442 U.S. at 571-76 (a lack of evidence of legislative intent to create a private right of action, either express or by implication, can by itself provide the answer that a private right of action should not be implied.).

2. The disparate-impact regulation is impermissibly beyond the scope of the statute.

The second inquiry in the *Angelastro* analysis prescribed by the Third Circuit is whether the regulation is within the scope of the enabling statute. As noted in Section I of this petition, the regulation is not within the scope of Section 602 (or, for that matter, of Section 601).

3. Implying a private right of action to enforce disparate-impact regulations would not be consistent with the purposes of the enabling statute.

Both the Third Circuit's *Angelastro* analysis and this Court's *Cort* analysis require consideration of whether implying a private remedy would be consistent with the

purpose of the legislative scheme. *Cort,* 422 U.S. at 78; *Angelastro,* 764 F.2d at 947.

In *Alexander* v *Choate,* this Court discussed the place of Section 602 in the legislative scheme of Title VI:

> In essence, then, we held [in *Guardians*] that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

469 U.S. at 293-94. The Department of Education regulations at issue here do not enumerate those things that would constitute improper disparate impacts. The regulations do not articulate factors that would justify mere statistical disparities. Instead, they generally prohibit "criteria or methods of administration which have the effect of subjecting individuals to discrimination" and they describe a mechanism for private persons to file complaints to initiate agency action. 34 C.F.R. §§ 100.3(a)(2) and 100.7(b). The regulatory scheme itself therefore strongly suggests that an agency should decide whether the allegations of a given administrative complaint describe a disparate impact that violates the regulation. Implying a private right of action to enforce the regulation bypasses that agency expertise.[17]

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[17] Reference to the agency in the first instance is made all the more appropriate by the fact that Title VI regulations typically include a straightforward mechanism for aggrieved parties to file complaints with the agency. As Justice Scalia recently wrote in regard to the

Moreover, Section 602 requires that no action be taken against a fund recipient "until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 42 U.S.C. § 2000d-1. Implication of a private right of action would entirely bypass that express notice requirement.

4. Implying a private right of action to enforce Title VI disparate-impact regulations has serious federalism implications.

While not all private actions brought under Title VI regulations are against state actors, a significant number are. *See, e.g., Powell* v *Ridge*, No. 98-2096 (CA3 1999); *Sandoval* v *Hagan*, No. 98-6598 (CA11 pending). The application of federal law to the States necessarily implicates issues of federalism and the Eleventh Amendment.

Title VI itself purports to abrogate Eleventh-Amendment immunity, at least for violations of the statute. 42 U.S.C. § 2000d-7. Accepting for purposes of argument that the statute successfully abrogates sovereign immunity, the issue then becomes whether an agency rule can abrogate that immunity for conduct that would not violate

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related issue of the exhaustion doctrine, "[w]here relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature, and must be dismissed." *Reiter* v *Cooper*, 507 U.S. 258, 269 (1993).

the statute. The Third Circuit has implicitly answered "yes."

The Third Circuit's decision conflicts with recent authority of this Court that limits abrogation. In *Seminole Tribe of Florida* v *Florida*, 116 S.Ct. 1114 (1996), the Court held that Congress could not use its Article I power to abrogate Eleventh-Amendment immunity. Accordingly, Congress has only one remaining avenue of abrogation: the enforcement provision of the Fourteenth Amendment. *City of Boerne* v *Flores*, 117 S.Ct. 2157, 2164 (1997). The implication in this case is straightforward. Congress enacted Title VI and, later, added language expressly abrogating sovereign immunity for actions to enforce the statute. 42 U.S.C. § 2000d-7. This Court held in *Guardians* that the statute reaches only purposeful discrimination. Accordingly, the abrogation reaches only purposeful discrimination. Viewed another way, the Third Circuit implicitly conferred the power to abrogate immunity on an executive agency, because this Court has already held that Congress did not itself prohibit disparate impacts. No agency has the power to abrogate sovereign immunity. *See Seminole Tribe*, 116 S.Ct. at 1123 (describing Congress' ability to abrogate in certain circumstances); *see also*, U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce . . .").[18]

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[18] This case demonstrates the danger inherent in such "Article-II abrogation." The Department of Education promulgated regulations that prohibit disparate impacts, but the regulation includes no affirmative defenses. 34 C.F.R. § 100.3 (Appendix E at 68a).

III. THE COURT OF APPEALS' DECISION PROVIDES AN OPPORTUNITY FOR THIS COURT TO CONSIDER THE APPLICATION OF *ASARCO* V *KADISH* IN A SITUATION IN WHICH THE SOURCES OF HALF OF THE OVERALL FUNDING ARE PLAINTIFFS RATHER THAN DEFENDANTS.

To have Article-III standing: (1) the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan* v *Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

The Legislative Parties argued below that the plaintiffs did not have standing because it was wholly speculative either that any cognizable injury was traceable to the state funding formula or that the remedy the plaintiffs request – injunctive and declaratory relief – would redress their claimed injuries. The Third Circuit disagreed:

> The legislative defendants err in assuming that the injury in this case consists of a lack of adequate funding. Here, the plaintiffs complain that non-white school children in Pennsylvania receive less favorable treatment than their white counterparts because the state funds the school districts most of them attend at a lower level than it does the school districts most white school children attend. A court

> order directing the state to equalize funding between these school districts would redress this comparative injury, even if other sources of the school district's income were simultaneously reduced. We therefore conclude that the school children's injury is redressable by court order.

(Appendix A at 30a). In so holding, the court of appeals confused the cause of action with the alleged injury, while simultaneously misconstruing both the allegations of the complaint and, more important, this Court's jurisprudence.

The plaintiffs allege that the School District has less money per student from all federal, state and local sources than some (but not all) other districts in the Commonwealth. They also allege that, among a subset of school districts in the Commonwealth that have comparable levels of student poverty, those with large minority student bodies receive less per student from the Commonwealth than those with a higher proportion of white students. As noted above, the Commonwealth provides only half of the funds used to operate the School District; most of the remainder comes from local taxes authorized by the City of Philadelphia. In their complaint, quoted by the court of appeals, the plaintiffs allege the injuries that follow from this funding situation:

> The foreseeable result [of the funding policies] has been serious impairment of the educational opportunities of the students in the School District, including the Student Plaintiffs. Lack of sufficient resources in the School District results, inter alia, in larger class sizes and higher pupil-to-teacher ratios than in surrounding school districts; reduced curricula; cuts in and elimination of programs and

> electives and advanced placement courses; shortages of textbooks; and use of outdated textbooks; shortages of equipment, supplies and technology; spartan physical education and extracurricular programs; lack of librarians and library services; insufficient numbers of counselors and psychologists; and many inadequate and crumbling physical facilities.

(Appendix A at 10a-11a). Because the alleged injury is a shortage of educational resources, but the substantial local portion of the total funding can float to whatever level the local officials see fit, the injury is not fairly traceable to the level of the state subsidy. The alleged injury is no more traceable to the state subsidy than it is to deficient funding provided by the federal government, which should also, under the Third Circuit's logic, have foreseen the impact of its funding determinations regarding Philadelphia.

The injury is also not redressable, again because local officials can offset any increase in state funding with a decrease in local funding. Indeed, one cannot even say that any court order equalizing the state subsidy to school districts on a per student basis would result in a funding increase to Philadelphia. To the extent that Philadelphia already receives an above-average subsidy, such an order would result in a net loss.

Distinguishing the cause of action from the injury leads to the conclusion that that any relief directed at the cause of action would not redress the injury. It leads to the ultimate conclusion that the plaintiffs lack Article III standing under this Court's decision in *Asarco, Inc.* v *Kadish*, 490 U.S. 605 (1989).

> Yet even if invalidation of the state law would create increased revenue for the school trust funds in the near future, an issue much disputed here, the allegations of economic harm rest on the same hypothetical assumptions as do the taxpayer claims. If respondents prevailed and increased revenues from state leases were available, maybe taxes would be reduced, or maybe the State would reduce support from other sources so that the money available for schools would be unchanged. ... These policy decisions might be made in different ways by the governing officials, depending on their perceptions of wise state fiscal policy and myriad other circumstances. *Whether the association's claims of economic injury would be redressed by a favorable decision in this case depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.*

490 U.S. at 614-15 (emphasis added). Just as the plaintiffs in *Asarco* were without standing because it was largely speculative that invalidation of the state statute would redress the asserted injury, so too are the plaintiffs in this case without standing. It is entirely speculative that the City – source of half of the funding for the School District – would maintain its current level of funding. Indeed, in its capacity as a plaintiff, the City has described its injury as including a high local tax rate. It is, therefore, likely that the City's response to an increase in state funding would be to commensurately decrease local funding to alleviate its alleged injury. The result, of course, would be that the School District's overall funding would change not at all. Moreover, the remedial effect of an increase in state

funding would also rest on the discretionary decisions of the School District about how to use its money.

Unlike the situation in *Asarco*, two of the most important actors on the funding issue are parties to this litigation. However, these two actors with discretionary control of funding are plaintiffs rather than defendants: the City of Philadelphia and the School District. A disparate-impact claim has not been asserted against them and, on the facts pleaded, could not be asserted. Therefore this case presents the Court with an opportunity to determine whether the holding of *Asarco* applies with equal vigor to a situation in which the independent actors with "unfettered discretion" are, in fact, before the court, but as plaintiffs rather than as defendants.

The Court has accepted review in other cases that seek to build incrementally on previous standing decisions. *See Friends of the Earth* v *Laidlaw Environmental Services, Inc.*, No. 98-0822, and *Steel Co.* v *Citizens for Better Environment*, 118 S.Ct. 1003 (1998). In addition, although the Court has recently considered a number of cases involving standing in a regulatory setting, *see, e.g., Steel Co.*, there is a paucity of standing cases arising from spending-power statutes in programs that do not involve personal entitlements, although this area of federal activity is an increasingly important font of federal litigation.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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SEPTEMBER 24, 1999

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW J. RYAN, ROBERT C. JUBELIRER, JESS M. STAIRS and JAMES J. RHOADES,

Petitioners,

vs.

DAVID POWELL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 98-2096

DAVID POWELL; SHELEAN PARKS; PATRICE EVERAGE; JULIA A. DAVIS; YVETTE BLAND; GERALDINE NEWTON; MARIA M. RIVERA; MARY E. MILLER; GREGORY LUZAK; CATHERINE LUZAK; FU-ZHEN XIE; THE BLACK CLERGY OF PHILADELPHIA AND VICINITY; PHILADELPHIA BRANCH NAACP; ASPIRA, INC. OF PENNSYLVANIA; PARENTS UNION FOR PUBLIC SCHOOLS; CITIZENS COMMITTEE ON PUBLIC EDUCATION IN PHILADELPHIA; PARENTS UNITED FOR BETTER SCHOOLS; DAVID W. HORNBECK, SUPERINTENDENT, The School District of Philadelphia; FLOYD W. ALSTON, PRESIDENT, Board of Education of the School District of Philadelphia; BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF PHILADELPHIA; THE SCHOOL DISTRICT OF PHILADELPHIA; EDWARD G. RENDELL, MAYOR, City of Philadelphia; CITY OF PHILADELPHIA

PHILADELPHIA FEDERATION OF TEACHERS LOCAL 3; TED KIRSCH, PRESIDENT, GUARDIAN AD LITEM,

Intervenors in D.C.

v.

THOMAS J. RIDGE, Governor of the Commonwealth of Pennsylvania; JAMES P. GALLAGHER,

CHAIRPERSON, Commonwealth of Pennsylvania State Board of Education; EUGENE W. HICKOK, SECRETARY OF EDUCATION; BARBARA HAFER, TREASURER

MATTHEW J. RYAN; ROBERT C. JUBELIRER; JESS M. STAIRS; JAMES J. RHOADES,

Intervenors in D.C.

Before: SLOVITER and MANSMANN, Circuit Judges and WARD, District Judge

(Filed: August 25, 1999)

OPINION OF THE COURT

SLOVITER, Circuit Judge.

Before us is an appeal by plaintiffs, including eleven parents of children who attend public schools in Philadelphia suing on their own behalf and that of their children (hereafter "school children"), from the order of the United States District Court for the Eastern District of Pennsylvania dismissing their complaint under Federal Rule of Civil Procedure 12. The complaint challenges the practices of the Commonwealth of Pennsylvania in funding public education as having a racially discriminatory effect. This appeal requires us to consider whether a private plaintiff may state a claim under a regulation implementing Title VI, whether the complaint adequately states a claim under that regulation, and whether a claim may be maintained under 42 U.S.C. § 1983 for violation of that regulation.

I.

On March 9, 1998, a diverse group of plaintiffs filed suit against several Pennsylvania officials, alleging in Count I the violation of the regulation the Department of Education (DOE) adopted to implement Title VI of the Civil Rights Act of 1964, and in Count II a violation of 42 U.S.C. § 1983. The parents of several Philadelphia public school children were joined as plaintiffs by the following six organizations that devote substantial resources to overcoming what they allege are the disparate and inadequate educational programs caused by the challenged practices: (1) The Black Clergy of Philadelphia and Vicinity; (2) Philadelphia Branch NAACP; (3) ASPIRA, Inc. of Pennsylvania; (4) Parents Union of Public Schools; (5) Citizens Committee on Public Education in Philadelphia; and (6) Parents United for Better Schools. Also joining as plaintiffs were several local officials and entities: (1) the School District of Philadelphia; (2) its superintendent, David W. Hornbeck; (3) its Board of Education; (4) the Board's president, Floyd W. Alston; (5) the City of Philadelphia; and (6) the City's mayor, Edward G. Rendell. These original plaintiffs were later joined without objection by intervenors the Philadelphia Federation of Teachers Local 3 AFT AFL-CIO, and Ted Kirsch as Guardian ad Litem.

The complaint names as defendants four state employees in their "official and individual capacities": Thomas J. Ridge, Governor of the Commonwealth of Pennsylvania; Dr. James P. Gallagher, Chairperson of the Board of Education of the Commonwealth of Pennsylvania; Dr. Eugene W. Hickok, Secretary of Education; and Barbara Hafer, Treasurer, (the "executive defendants"). Four Commonwealth legislative leaders,

Representative Matthew J. Ryan, Senator Robert C. Jubelirer, Representative Jess M. Stairs, and Senator James J. Rhoades, joined as intervenor defendants ("legislative defendants").

All of the plaintiffs seek two forms of relief: (1) "a declaration that the defendants 'through their funding policies and practices, discriminate against African-American, Hispanic, Asian and other minority students in the School District and the City'" in violation of the administrative regulation promulgated under Title VI and (2) "an injunction prohibiting defendants prospectively 'from continuing to implement a system of funding public schools that discriminates against . . . minority children enrolled in' the School District 'and that thereby harms' all plaintiffs." Appellants' Br. at 16. The school children and organizations also seek "a declaration that [the] funding policies and practices deprive them of the rights, privileges and immunities secured by the laws of the United States, in violation of § 1983." Appellants' Br. at 16.

On May 4, 1998, the original defendants filed a motion to dismiss the complaint under Rule 12(b)(6). In June, the United States filed a brief amicus curiae in support of the plaintiffs. On July 6, 1998, the intervening defendants also filed a Rule 12(b)(6) motion to dismiss. The United States then filed a second brief amicus curiae. The original defendants and the intervening defendants each filed a second motion to dismiss after the Supreme Court dismissed its grant of certiorari in *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), vacated as moot, 119 S. Ct. 22 (1998). Certiorari had been sought on this court's holding in *Chester Residents* that an implied private right of action exists under the regulations promulgated under Title VI. In

response to the four motions to dismiss, plaintiffs requested oral argument and/or a status conference, and the United States notified the District Court that it intended to file an additional amicus brief addressing the *Chester Residents* decision. The District Court, however, dismissed the complaint for failure to state a claim without holding the requested status conference, hearing oral argument, or waiting to receive the government's third amicus brief.

Our review of a district court's dismissal of a complaint is plenary. *See Moore v. Tartler*, 986 F.2d 682, 685 (3d Cir. 1993). We apply the same test the district court should have used initially. *See Holder v. City of Allentown*, 987 F.2d 188, 193 (3d Cir. 1993). We will not uphold a dismissal for failure to state a claim if, "under any reasonable reading of the pleadings, plaintiff may be entitled to relief." *Id.* at 194. In reviewing the plaintiff's complaint, "[w]e are required to 'accept as true the facts alleged . . . and all inferences that can be drawn therefrom.'" *D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1367 (3d Cir. 1992) (*en banc*) (quoting *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990)).

II.

Section 601 of Title VI of the Civil Rights Act of 1964 provides:

> No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. The Supreme Court has held that section 601 of Title VI prohibiting exclusion or discrimination from federal programs on account of race, color or national origin prohibits only intentional discrimination. *See Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983).

However, another provision of Title VI, section 602, "authorize[s] and direct[s]" federal departments and agencies that extend federal financial assistance to particular programs or activities "to effectuate the provisions of section 2000d [section 601] . . . by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1. At least 40 federal agencies have adopted regulations that prohibit disparate-impact discrimination pursuant to this authority. *See Guardians*, 463 U.S. at 619
(Marshall, J. dissenting).

The Department of Education, in exercising its statutory authority under section 602, promulgated such a regulation, codified as 34 C.F.R. § 100.3(b)(2), which prohibits a funding recipient from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the program as respects individuals of a particular race, color, or national origin." Id. Count I of the complaint before us is based on this regulation prohibiting discriminatory effects in educational programs.

A.

The District Court held that the complaint fails to state a claim under Title VI[1] or the Department of Education's Title VI regulations because it does not adequately allege that a specific element of the Commonwealth's funding practices adversely and disproportionately affects students of a particular race. *Powell v. Ridge*, No. 98-1223, slip op. at 32 (E.D. Pa. Nov. 18, 1998). Plaintiffs challenge this holding on appeal, insisting that their complaint meets the applicable pleading standard.

Although the Supreme Court has not yet spoken on the issue, the courts of appeals have generally agreed that the

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[1] The District Court read the complaint as alleging a violation of Title VI. At oral argument, the plaintiffs' counsel acknowledged that the complaint does not have a separate count under the statute, although it does allege that defendants adopted their different funding methodologies with knowledge of the racially discriminatory consequences. Counsel noted that in a recent decision, *Davis v. Monroe County Board of Education*, 119 S. Ct. 1661 (1999), the Supreme Court held that in some circumstances a school district's deliberate indifference to sexual harassment of which it had knowledge amounts to an intentional violation of Title IX. Counsel here argued that there is a spectrum between the extremes of intentional discrimination and discriminatory effect. It appears that plaintiffs suggest that with discovery they may be able to make a case of intent under Title VI comparable to that which the Court accepted in Davis as meeting the intent requirement under Title IX. Without deciding whether a variation of the Davis standard applies here, we believe that plaintiffs have made adequate allegations to survive a motion to dismiss and justify discovery. We note that plaintiffs here recognized that "allegations of racial discrimination are very serious." Plaintiffs should not be penalized for their scrupulousness in declining to include allegations against elected officials concerning conduct that they suspect but of which they currently have no direct proof.

parties' respective burdens in a Title VI disparate impact case should follow those developed in Title VII cases. *See, e.g., New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *City of Chicago v. Lindley*, 66 F.3d 819, 828-29 & n.12 (7th Cir. 1995); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993); cf. *NAACP v. Medical Ctr., Inc.*, 657 F.2d 1322, 1333 (3d Cir. 1981) (*en banc*) (accepting without comment parties' suggestion that "the decisional law allocating the burden of production and persuasion under Title VII is instructive in [a Title VI] case"). Thus, a plaintiff in a Title VI disparate impact suit bears the initial burden of establishing a prima facie case that a facially neutral practice has resulted in a racial disparity. *See Ferguson v. City of Charleston*, ___ F.3d ___, 1999 WL 492681 (4th Cir. July 13, 1999); *New York Urban League*, 71 F.3d at 1036; *Elston*, 997 F.2d at 1407. If the plaintiff meets that burden, then the defendant must establish a "substantial legitimate justification," *see New York Urban League*, 71 F.3d at 1036, or a "legitimate, nondiscriminatory reason[ ]," *Medical Ctr. Inc.*, 657 F.2d at 1331, for the practice. *See Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985). Once the defendant meets its rebuttal burden, the plaintiff must then establish either that the defendant overlooked an equally effective alternative with less discriminatory effects or that the proffered justification is no more than a pretext for racial discrimination. *See Georgia State Conference*, 775 F.2d at 1417.

At trial, a Title VI disparate impact plaintiff cannot meet the burden of establishing a prima facie case without proving "that the defendants' racially neutral practice detrimentally affects persons of a particular race to a greater extent than other races." *Id.* at 1421. It is not

enough for the plaintiff "merely [to] prove circumstances raising an inference of discriminatory impact at issue; [the plaintiff] must prove the discriminatory impact at issue." *Johnson v. Uncle Ben's Inc.*, 657 F.2d 750, 753 (5th Cir. 1981).

The burden a Title VI plaintiff must meet to survive a motion to dismiss, however, is much less onerous. To survive a motion to dismiss, all that the plaintiff must do is plead that a facially neutral practice's adverse effects fall disproportionately on a group protected by Title VI. The Court of Appeals for the Eighth Circuit explained in *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924 (8th Cir. 1993): "the prima facie case under [disparate impact] analysis is an evidentiary standard -- it defines the quantum of proof plaintiff must present to create a rebuttable presumption of discrimination . . . . Under the Federal Rules of Civil Procedure, an evidentiary standard is not a proper measure of whether a complaint fails to state a claim." *Id.* at 926. Furthermore, as the Supreme Court has stated, "[w]hen a federal court reviews the sufficiency of a complaint . . . [t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); accord *Lake v. Arnold*, 112 F.3d 682, 688 (3d Cir. 1997).

The complaint in this case states, *inter alia*:

> The Commonwealth Defendants' funding system for education gives school districts with high proportions of white students on average more Commonwealth treasury revenues than school districts with high

> proportions of non-white students, where the levels of student poverty are the same.

App. at 37-38.

> When Commonwealth treasury revenues per pupil are analyzed by the amount of poverty in school districts across the Commonwealth . . . school districts with higher proportions of non-white students receive less Commonwealth treasury revenues than districts with higher proportions of white students.

App. at 38-39.

> On average, for 1995-96, for two school districts with the same level of poverty . . . the school districts with higher non-white enrollment received $52.88 less per pupil for each increase of 1% in non-white enrollment.

App. at 39.

> The Commonwealth's funding policies and practices disadvantage . . . students in [underfunded] districts . . . . The foreseeable result [of the funding policies] has been serious impairment of the educational opportunities of the students in the School District, including the Student Plaintiffs. Lack of sufficient resources in the School District results, *inter alia*, in larger class sizes and higher pupil-to-teacher ratios than in surrounding school districts; reduced curricula; cuts in and elimination of programs and electives and advanced placement courses, shortages of textbooks and use of outdated textbooks; shortages of equipment, supplies and technology; spartan physical education and extracurricular programs; lack of librarians and

> library services; insufficient numbers of counselors and psychologists; and many inadequate and crumbling physical facilities.

App. at 40-41.

These allegations are sufficient to put the defendants on notice that the plaintiffs will attempt to prove (1) that less educational funding is provided by the Commonwealth to school districts attended by most non-white students in Pennsylvania than to school districts attended by most white students, (2) that the school districts attended by most non-white students in Pennsylvania receive less total educational funding than do the school districts attended by most white students,[2] (3) that these disparities in funding are produced by the Commonwealth's funding formula, and (4) that the funding disparities injure non-white students by limiting their educational opportunities. Although the language of the complaint may not always be precise or its thrust clear, we nonetheless believe that plaintiffs' allegations provide more than sufficient notice to meet the pleading standard. We therefore hold that the plaintiffs should be given the opportunity to offer evidence in support of their claims.

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[2] In their reply brief, the plaintiffs state, "The Complaint alleges adverse racial impact in both the distribution of Commonwealth treasury revenues and the allocation of total public school funding dollars in Pennsylvania, for which the Commonwealth is statutorily and constitutionally responsible. *See, e.g.*, J.A. 35-39, ¶¶ 47, 52, 56, 57." Appellants' Reply Br. at 24. Although a liberal reading of the paragraphs cited appears to support plaintiffs' statement, if there is any disagreement as to whether the complaint does so allege, it can be resolved by amendment.

Whether they will ultimately be entitled to prevail is a very different question on which we express no opinion.

The District Court's contrary conclusion that the plaintiffs' complaint does not meet the pleading standard rests on a mischaracterization of the complaint. The District Court described the complaint as alleging that "the uniformly applied state formula for allocating basic education funds among the 501 school districts does not bring about the same results in Philadelphia as it might in another, more affluent district. . . ." *Powell*, slip op. at 29. This characterization suggests that the disparity the plaintiffs have pled is one based on economic circumstances rather than race. However, the complaint specifically alleges that the disparity in funding cannot be explained by reference to relative wealth or poverty because the disparities are present when districts of the same poverty level are compared. *See, e.g.*, App. at 37-39.

The District Court also stated that "the Plaintiffs want the School District to get more than the statutory formula provides under the theory that factors external to the state subsidy program make education more expensive or funding shortfalls greater in Philadelphia." *Powell*, slip op. at 32. This misstates the plaintiffs' request. Notwithstanding the District Court's characterization, the plaintiffs do not rely on any factors external to the state subsidy program in seeking more funding than is provided under the statutory formula. According to their allegations, they seek more funding on the ground that the formula provides minority school districts[3] with less funding than it

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[3] The complaint focuses on the Philadelphia School District which is alleged to have a 77% to 80% minority student body. Plaintiffs allege

does similarly situated non-minority districts, regardless of the cost of education.

Because these mischaracterizations affected the District Court's decision and because a review of the complaint establishes that the complaint, when not mischaracterized, meets the pleading standard, we must reverse.

Defendants argue that the complaint fails to state a claim because it compares the effect of the funding formula on school districts rather than its effect on individuals. Unquestionably, under Title VI and 34 C.F.R. § 100.3(b)(2), the disparate impact complained of must fall on an individual rather than on a school district. Plaintiffs, cognizant of that requirement, have alleged that the Commonwealth's funding system results in proportionately less funding per child to school districts with high proportions of non-white students than to school districts with high proportions of white students. They argue that the effect of less funding per student is larger class sizes, higher pupil per teacher ratios, reduced curricula, fewer programs, and less textbooks, equipment, supplies, and technology per student than received by school districts with proportionately more white students. While it may ultimately be more difficult to prove the impact, and consequently the disparate impact, on the school children because the funding is directed to the school districts, that potential difficulty does not justify denying plaintiffs the opportunity to prove the effect alleged.

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that there are eleven other school districts in Pennsylvania with student bodies composed of more than 50% minorities.

Defendants also argue that plaintiffs' comparisons of school districts are invalid because there are some white students in the allegedly disadvantaged minority school districts and some non-white students in the allegedly advantaged white school districts. Defendants' position was made explicit at oral argument when their counsel stated that in order to show an adverse effect, "It's my position that [plaintiffs] have to show that 100 percent [of the minority students] are, in fact, adversely affected." Transcript of Oral Argument at 53. We know of no authority that imposes such a requirement. The regulation merely prohibits "the effect of subjecting individuals to discrimination because of their race." If plaintiffs succeed in their attempt to show disparate effect resulting from the challenged funding practices, the number of non-white school children affected might be relevant to the factfinder's determination whether the adverse effect is "because of their race." We have never held, however, that as a matter of law the practice complained of must affect a certain minimum percentage of the minority group to justify a finding that the discrimination is because of race.

In addition, defendants complain that plaintiffs only compare subsets of school districts, selected by reference to such factors as poverty, proximity to the School District, or "high proportion" of minority school children (sometimes described as 75% or more minority enrollment). Specifically, defendants contend that plaintiffs never "compare the total revenues of all minority districts, however defined, with the total revenues of all majority districts [presumably per student]." Executive Defendants' Br. at 22. We need not determine here whether the particular comparisons plaintiffs make in their complaint are either necessary or sufficient to prove disparate impact. The relevance and validity of these comparisons goes to the

merits of plaintiffs' case, not to the maintenance of their complaint, and should be determined only upon a developed record.

Finally, defendants contend that the complaint is insufficient because it fails to identify a particular part of the funding formula as producing the disparate impact. This argument assumes without justification that it is a portion of the formula and not the formula as a whole that produces the alleged effects. Moreover, it would be a daunting hurdle were plaintiffs required at the pleading stage, before answers have been filed and before discovery, to identify what specific portion or portions of the Commonwealth's complex funding formula is responsible for the alleged inequality. We note that there are many components to the Commonwealth's formula, which the plaintiffs allege was changed each year between 1991-92 and 1996-97. Indeed, even after requesting and receiving supplemental briefs from the parties concerning that formula, we remain unable to discern with precision the basis on which the Commonwealth funds the school districts. It may be that some of the necessary information will be forthcoming from the defendants' files and employees during discovery.

Under these circumstances, we conclude that the plaintiffs did not need to identify in the complaint a particular portion of the formula as objectionable in order to plead a disparate impact claim. To survive a motion to dismiss, plaintiffs need merely plead sufficient allegations to put the defendants on notice of what they intend to prove at trial. The defendants in this case are on notice that plaintiffs intend to prove that their funding formula produces disparate effects, and the defendants are in as

good a position as anybody to know precisely what that funding formula entails.

B.

Defendants argue that we should uphold the District Court's decision on the alternate ground that Title VI regulations do not provide a private right of action. It is by now well established that implication of a private right of action for a statute requires analysis of the factors set forth in *Cort v. Ash*, 422 U.S. 66 (1975). The *Cort* factors ask:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted"-- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted). A similar analysis which incorporates the *Cort* factors is appropriate in determining whether to infer a private right of action from an agency rule or regulation. *See Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939 (3d Cir. 1985).

In *Chester Residents*, 132 F.3d at 927, a decision that has since been vacated as moot, this court considered the issue before us here, "whether a private right of action exists under discriminatory effect regulations promulgated

by federal administrative agencies pursuant to section 602 of Title VI." Although the plaintiffs there had contended that the Supreme Court's decisions in *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983), and *Alexander v. Choate*, 469 U.S. 287 (1985), establish the existence of a private right of action under the regulations, we rejected that contention. We noted that although five Justices implicitly endorsed the existence of a private right of action in those cases, the Supreme Court never directly addressed the issue. *See Chester Residents*, 132 F.2d at 929-33.

We also rejected the suggestion of the defendants that our discussion in *Chowdhury v. Reading Hospital and Medical Center*, 677 F.2d 317 (3d Cir. 1982), regarding the requirements for a claim of intentional discrimination under section 601 of Title VI necessarily means that there is no private right of action under section 602 of the Act. We thus found no direct authority confirming or denying a private right of action under the Title VI regulation. *Chester Residents*, 132 F.3d at 931.

We then proceeded to apply the *Angelastro* analysis to decide whether such a right of action should be inferred. In *Angelastro*, we applied a three-pronged test in"[d]eciding whether to imply a private right of action from an agency rule." First, a court must ascertain whether a private right of action exists under the statute under which the rule was promulgated. *See id.* "If under *Cort v. Ash* and its progeny, a court finds that Congress did not intend the statute to be enforced by private actions, then the inquiry is concluded." *Id.* Otherwise, two further inquiries must be made: "whether the agency rule is properly within the scope of the enabling statute" and "whether implying a

private right of action will further the purposes of the enabling statute." *Id.*

In *Chester Residents*, we quickly resolved the inquiry into the second and third prongs of *Angelastro*. We determined that the agency rule is properly within the scope of Title VI because in its unanimous opinion in *Alexander* the Supreme Court stated that "'actions having an unjustifiable disparate impact on minorities [can] be redressed through agency regulations designed to implement the purposes of Title VI.'" *Chester Residents*, 132 F.3d at 933 (alteration in original) (quoting *Alexander*, 469 U.S. at 293).

We also concluded that the third prong – whether implying a private right of action under the disparate impact regulations will further the purposes of Title VI -- was also satisfied. Title VI's purposes are to "(1) combat discrimination by entities who receive federal funds; and (2) provide citizens with effective protection against discrimination." *Id.* at 936 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979)). Therefore, we reasoned, "a private right of action will increase enforcement," and we concluded that such increased enforcement will further Title VI's purposes, compensating for the agency's lack of sufficient resources to adequately enforce the regulation itself. *Chester Residents*, 132 F.3d at 936.

The *Angelastro* prong to which we devoted the most attention in *Chester Residents* was the first inquiry, which asks whether the statute under which the regulation was promulgated (here Title VI) properly permits the implication of a private right of action. We analyzed this prong in *Chester Residents* in terms of the *Cort* factors and

determined that the Title VI regulations create federal rights in favor of individual plaintiffs (the first *Cort* factor), and that "there is some indication in the legislative history . . .of an intent to create a private right of action" (the second *Cort* factor). *See Chester Residents*, 132 F.3d at 933 n.10, 934. We further held that implying a remedy for the plaintiffs is consistent with the underlying purposes of the legislative scheme (the third factor), reasoning:

> The procedural requirements in section 602 provide a fund recipient with a form of notice that the agency has begun an investigation which may culminate in the termination of its funding. We note that a private lawsuit also affords a fund recipient similar notice. If the purpose of the requirements is to provide bare notice, private lawsuits are consistent with the legislative scheme of Title VI. Furthermore, unlike the EPA, private plaintiffs do not have authority to terminate funding. As a result, the purpose that the requirements serve is not as significant in private lawsuits, where the potential remedy does not include the result (i.e., termination of funding) at which Congress directed the requirements. Stated differently, the requirements were designed to cushion the blow of a result that private plaintiffs cannot effectuate.

Id. at 935-36 (footnote omitted). Finally, the last *Cort* factor -- whether the cause of action is one traditionally relegated to state law, in an area basically the concern of States -- was deemed "irrelevant because Title VI is federal law." *Id.* at 933 n.10.

We need not take this somewhat circuitous route to analyze the first *Angelastro* factor in the inquiry we make

here. In *Angelastro*, we explained that the initial inquiry focuses on whether the statute implemented by the regulation contains an implied private right of action: "Where the enabling statute authorizes an implied right of action, courts should permit private suits under agency rules within the scope of the enabling statute if doing so is not at variance with the purpose of the statute. . .. [I]f Congress intended to permit private actions for violations of the statute, 'it would be anomalous to preclude private parties from suing under the rules that impart meaning to the statute.'" 764 F.2d at 947.

As noted above, the regulation at issue here, although promulgated by the Department of Education under section 602 of Title VI, implements section 601 of Title VI. *See* 42 U.S.C. § 2000d-1 (authorizing regulation "to effectuate the provisions of section 2000d of . . . title [42]"). The Supreme Court precedent and our cases firmly establish that section 601 of Title VI gives rise to an implied right of action, at least for purposes of securing injunctive relief. *See Guardians*, 463 U.S. at 593-95 (Opinion of White, J.); *Cannon*, 441 U.S. at 694-703, 710-16; *Cheyney State College Faculty v. Hufstedler*, 703 F.2d 732, 737 (3d Cir. 1983); *NAACP v. Medical Ctr., Inc.*, 599 F.2d 1247, 1248, 1250 n.10 (3d Cir. 1979). It therefore follows that the first prong of *Angelastro* is satisfied. We are persuaded by the analyses in *Chester Residents* that the second and third prong of *Angelastro* are also met.

Our conclusion is in keeping with the decisions of the other courts of appeals that have addressed this issue. The Eleventh Circuit has explicitly "recognized an implied private right of action to enforce the regulations promulgated under section 602 of Title VI," thereby permitting private plaintiffs to "obtain injunctive or

declaratory relief by showing, *inter alia*, that the challenged action has 'a disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory.'" *Burton v. City of Belle Glade*, No. 97-5091, 1999 WL 425895 (11th Cir. June 25, 1999) (quoting *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993)); *see also Georgia State Conference*, 775 F.2d at 1417. At least four other federal courts of appeal have reached the merits of disparate impact claims brought by individual plaintiffs under the Title VI regulations, although without explicitly determining whether a private right of action exists thereunder. *See Villanueva v. Carere*, 85 F.3d 481, 486-87 (10th Cir. 1996) (affirming refusal to grant preliminary injunction on grounds that disparate impact had not been adequately shown); *New York Urban League, Inc. v. New York*, 71 F.3d 1031 (2d Cir. 1995) (same); *City of Chicago v. Lindley*, 66 F.3d 819, 827-30 (7th Cir. 1995) (affirming grant of summary judgment to defendant on ground that disparate impact had not been adequately shown); *Larry P. by Lucille P. v. Riles*, 793 F.2d 969 (9th Cir. 1984) (affirming judgment for plaintiff on disparate impact claim following trial).

Defendants nevertheless argue that interpreting the Title VI regulation to provide a private right of action would contravene the Supreme Court's pronouncement in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), that administrative regulations may not create federal law. There the Court stated, "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *See id.* at 213-14 (internal quotation marks omitted). Defendants

argue that because the Title VI regulation extends the conduct prohibited by Title VI to encompass disparate impact discrimination, whereas Title VI prohibits only intentional discrimination, a holding that private suits may be brought under the regulation would effectively permit administrative agencies to create substantive law.

Defendants' argument conflicts with the Supreme Court's own pronouncements. As previously noted, in *Guardians* five of the nine justices agreed that the administrative regulations incorporating a disparate impact standard are valid, *see* 463 U.S. at 584 n.2, 607 n.27, and thereafter the Court in *Alexander* characterized *Guardians* as so holding. *See Alexander*, 469 U.S. at 293 ("[*Guardians* held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI"). Obviously, the Supreme Court did not believe that administrative regulations that prohibit disparate impact were an impermissible creation of substantive law, even though in its own earlier opinion in *Guardians* the Supreme Court had held that Title VI itself did not extend that far. *See also United States v. O'Hagan*, 521 U.S. 642, 672-73 (1997) (sustaining SEC regulation that prohibits more activities than statute on ground that "[a] prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited").

Moreover, numerous other appellate decisions have implied private rights of actions under regulations under similar circumstances. *See, e.g., Lowrey v. Texas A&M University System*, 117 F.3d 242 (5th Cir. 1997) (Department of Education regulations promulgated under Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 et seq.); *Robertson v. Dean Witter Reynolds*,

Inc., 749 F.2d 530 (9th Cir. 1984) (Securities and Exchange Commission Rule 10b-16, 17 C.F.R. § 240.16). In each of these cases, the analysis as to whether there was a private right of action to enforce the regulation at issue would not have been necessary if the regulation did not go further than that statute; the private right of action under the particular statute alone would have sufficed.

We therefore reject defendants' arguments that Count I of this complaint does not state a claim under the Department of Education regulation. We do not decide whether every allegation of Count I of the complaint states a viable claim under the Title VI regulation. Because the District Court misread the thrust of the complaint, it never parsed the allegations to ascertain how and whether they differ. We do not suggest that the complaint be dissected upon remand. We merely decide that there is at least one viable claim and that plaintiffs should be permitted to proceed to discovery after answers have been filed.

C.

Plaintiffs' second count invokes one of the Civil Rights Acts, 42 U.S.C. § 1983, to redress the defendants' alleged violation of the regulation. Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in a[ ] . . . proper proceeding for redress.

The District Court properly interpreted this statute to mean that "[a] § 1983 action has two essential elements: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that this conduct deprived a [citizen or other] person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Powell*, slip op. at 12 (emphasis added).

The District Court pretermitted any analysis of whether the complaint adequately alleges that the defendants deprived any person of rights secured by the laws of the United States within the scope of § 1983 because it held that the four defendants cannot be sued under that statute. First it held that "[a]s officials of the Commonwealth of Pennsylvania who have been sued for actions taken while in their official capacities, Ridge, Hickok and Hafer are not 'persons' under § 1983." *Id.* at 14. Then it held that Gallagher, who was sued solely for actions taken in his official capacity as the chairperson of the Commonwealth's Board of Education, is not a "person" who may be sued under § 1983 because the Board's funding comes directly from the Commonwealth and it is therefore "an arm of the state" immune from suit. *Id.*

The District Court's conclusions contravene the applicable Supreme Court precedent. When state officials are sued in their official capacities for damages, that suit is treated as one against the state and the official is not considered to be a "person." *See Will v. Michigan Dept. of State Police*, 492 U.S. 58, 71 & n.10 (1989). Hence, § 1983 cannot be invoked. On the other hand, when the § 1983 suit seeks damages against the state officials in their individual or personal capacities, it may be maintained (subject to any applicable immunity doctrine) even though

they acted in their official capacities in the matter at issue. *See Hafer v. Melo*, 502 U.S. 21, 27 (1991) ("A government official in the role of personal-capacity defendant . . . fits comfortably within the statutory term 'person'").

A suit for damages must be contrasted with a suit for equitable relief. The Supreme Court has held that a state official sued for injunctive relief is a "person" under § 1983 because an action for prospective relief is not treated as a suit against the state. *See Will*, 491 U.S. at 71 n.10 ("[A] state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" (quoting *Kentucky v. Graham*, 473 U.S. 19, 167 n.14 (1985)); *see also Edelman v. Jordan*, 415 U.S. 651, 666-74 (1974) (discussing *Ex parte Young*, 209 U.S. 123 (1908)).

The complaint in this case seeks only the equitable remedies of an injunction and declaratory relief. The conclusion that Ridge, Hickok, Hafer, and Gallagher are persons within the meaning of § 1983 is thus inescapable.

Perhaps not surprisingly, defendants have chosen not to defend the District Court's reasoning, arguing instead that the District Court's decision may be upheld on another ground. Notwithstanding our general reluctance to venture into areas the District Court did not consider, we consider this issue now as a matter of judicial expediency because the case will be remanded and it will undoubtedly arise again.

Defendants first argue that Title VI's "comprehensive enforcement scheme" precludes a § 1983 claim. Once a plaintiff has identified a federal right that has allegedly

been violated, there arises a "rebuttable presumption that the right is enforceable under § 1983." *Blessing v. Freestone*, 520 U.S. 329, 341 (1997). The presumption is rebutted "if Congress 'specifically foreclosed a remedy under § 1983' . . . [either] expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* (quoting *Smith v. Robinson*, 468 U.S. 992, 1005 n.9 (1984)).

Neither Title VI nor the regulation promulgated thereunder purports to restrict the availability of relief under § 1983. Defendants thus "must make the difficult showing that allowing a § 1983 action to go forward in these circumstances 'would be inconsistent with Congress' carefully tailored scheme.'" *Id.* at 346 (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107 (1989)).

Only twice has the Supreme Court found a remedial scheme sufficiently comprehensive to supplant § 1983. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Smith v. Robinson*, 468 U.S. 992 (1984). In both instances, the Supreme Court emphasized that the statutes that were held to be displaced themselves specifically provided aggrieved individuals with extensive statutory remedies. However, the Supreme Court has cautioned that "a plaintiff's ability to invoke § 1983 cannot be defeated simply by '[t]he availability of administrative mechanisms to protect plaintiff 's interests.'" *Blessing*, 520 U.S. at 347 (quoting *Golden State*, 493 U.S. at 347). On at least three occasions the Court found that an agency's authority to cut off federal funding was insufficient to justify the denial of a § 1983 remedy. *See Wright v. City of Roanoke Redevelopment and Housing*

Auth., 479 U.S. 418, 428 (1987); *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 521-22 (1990); *Blessing*, 520 U.S. at 347-48.

Cognizant of this guidance, we see no reason to hold that resort to § 1983 has been foreclosed here. Neither Title VI nor the Department of Education regulation establishes "an elaborate procedural mechanism to protect the rights of [individual plaintiffs]," as did the statute at issue in *Smith*, where the Court stated, "The [Act's] procedures . . . ensure that hearings [are] conducted by the state[and that these hearings are] fair and adequate," 468 U.S. at 1010-11 (interpreting the Education of the Handicapped Act, 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq.*). Nor is it possible to describe the administrative remedies Title VI and the regulations establish as "unusually elaborate," as the Court described the enforcement provisions of the pollution control statutes at issue in *Sea Clammers*. *See* 453 U.S. at 13. Indeed, the statutory scheme under Title VI does not specifically provide individual plaintiffs with any administrative remedy. *See Chowdhury*, 677 F.2d at 319 (noting that under the administrative enforcement mechanism Congress provided in section 602 of Title VI, "an aggrieved individual may file a complaint with the funding agency but has no role in the investigation or adjudication, if any, of the complaint" (footnotes omitted)).

Defendants nonetheless contend that we are constrained to hold that plaintiffs' claim under § 1983 may not coexist with Title VI because of our decisions in two Title IX cases: *Williams v. School District*, 998 F.2d 168 (3d Cir. 1993), and *Pfeiffer v. Marion Center Area School District*, 917 F.2d 779 (3d Cir. 1990). In *Williams*, a male student brought suit alleging that the defendants violated Title IX by excluding him from the girls' field hockey team.

Williams' complaint also stated a claim under § 1983 and the Equal Protection Clause. On appeal, we reversed the grant of summary judgment to Williams on the Title IX claim, holding that disputed issues of material fact remained. We also vacated the district court's judgment for plaintiff on his constitutional claims brought under § 1983. We held that the district court should have refrained from deciding the plaintiff 's § 1983 action in keeping with "the Supreme Court's admonition that courts should exercise restraint before reaching federal constitutional claims." *Williams*, 998 F.2d at 176.

In *Williams*, we relied on our earlier opinion in *Pfeiffer*, where we upheld the district court's decision not to reach plaintiff 's constitutional claims of gender discrimination brought under § 1983 once it had decided that Pfeiffer's constitutional claims were "subsumed" within her Title IX claim.

Defendants contend that these cases stand for the broad proposition that all § 1983 claims are precluded by Title IX and argue that Title VI must be similarly interpreted. Those decisions cannot be interpreted that broadly. They concerned the interaction between a plaintiff's constitutional claims and statutory claims, and the holdings were predicated on the principle that courts should refrain from deciding constitutional issues unnecessarily. For example, in *Williams* we stated that the proper course in *Pfeiffer* was for the district court to "refuse[ ] to hear plaintiff 's section 1983 claim." *Williams*, 998 F.2d at 176 (emphasis added). Similarly, we described ourselves as "not reach[ing] the constitutional issues" Williams sought to raise. *Id.* (emphasis added). We vacated the district court's § 1983 ruling, rather than reversing it or remanding for further proceedings. Those holdings and

pronouncements are consistent with the prudential imperative not to resolve a constitutional issue unnecessarily. They do not suggest, as defendants state, that there can never be a § 1983 claim for violation of Title IX.

Most important here is that plaintiffs do not invoke § 1983 to redress a constitutional claim but instead a claim under federal law. Thus, the principle that courts should avoid deciding constitutional claims whenever possible is inapplicable. We therefore reject defendants' contention that our decision here is controlled by these past precedents. Instead, we hold that a § 1983 suit is not incompatible with Title VI and the Title VI regulation. At oral argument, plaintiffs' counsel recognized that at some point in the litigation it may develop that it is not necessary to maintain both the claim evolving from Title VI and the § 1983 claim, and the approach taken in *Pfeiffer* and *Williams* may be appropriate. We agree that no more is required now.

D.

Finally, the legislative intervenor defendants question the plaintiffs' standing to maintain each count of their complaint on the ground that plaintiffs' injury is not likely to be redressed by court action. In order to have standing under the Constitution, a plaintiff must show (1) an actual injury that is (2) causally connected to the conduct complained of and (3) likely to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks omitted). The injury must consist of "an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or

hypothetical." *Id.* at 560 (citations and internal quotation marks omitted).

The legislative defendants contend that any injury the plaintiffs may have suffered is not redressable because "approximately half of the funds received by the School District are from local sources not controlled by the Executive Branch Defendants," who presumably are free to decrease their contribution for public education. Legislative Defendants' Br. at 35. The legislative defendants therefore conclude that, under those circumstances, the court's order would not redress the plaintiffs' injury, and hence they have no standing.

We reject the defendants' contention because their argument implicitly mischaracterizes plaintiffs' injury. The legislative defendants err in assuming that the injury in this case consists of a lack of adequate funding. Here, the plaintiffs complain that non-white school children in Pennsylvania receive less favorable treatment than their white counterparts because the state funds the school districts most of them attend at a lower level than it does the school districts most white school children attend. A court order directing the state to equalize funding between these school districts would redress this comparative injury, even if other sources of the school district's income were simultaneously reduced. We therefore conclude that the school children's injury is redressable by court order.[4]

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[4] Moreover, plaintiffs take the position that the Commonwealth is responsible for all of the School District's funding. We need not decide that issue in order to hold that plaintiffs have adequately pled standing.

The concept of standing also encompasses prudential limits on federal-court jurisdiction. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975). Courts require plaintiffs to satisfy certain prudential concerns in an effort "to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). Thus, they require (1) that the injury alleged not be a "generalized grievance" that is "shared insubstantially equal measure by all or a large class of citizens," (2) that the plaintiff assert his/her own legal rights rather than those of other parties, and (3) that "the plaintiff 's complaint . . . fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982) (internal quotation marks omitted).

Not all plaintiffs must meet the prudential standing requirements imposed by courts. Congress may legislatively direct that standing under a particular act is to be limited only by Article III. *See Gladstone, Realtors*, 441 U.S. at 100; *Fair Housing Council v. Montgomery Newspapers*, 141 F.3d 71, 75 (3d Cir. 1998). In such case plaintiffs may "'seek relief on the basis of the legal rights and interests of others, and . . . may invoke the general public interest'" in support of their claim. *Fair Housing Council*, 141 F.3d at 75 (*quoting Warth*, 422 U.S. at 500).

The defendants contend that the City of Philadelphia, the School District of Philadelphia, the Board of Education of the School District of Philadelphia, and the individual officers (collectively, the "City and School District

plaintiffs") lack prudential standing because they are not asserting their own legal rights, but rather those of other parties. The legislative defendants argue that the City and School District plaintiffs are not "person[s]" within the meaning of Title VI and that, therefore these plaintiffs have no rights of their own under that statute. The District Court accepted this contention and dismissed the complaint as to the City and School District plaintiffs. The plaintiffs challenge that dismissal on appeal.

A determination of the standing of the City and School District plaintiffs at this time would involve us in a complex issue that may have no practical significance. We note in this regard that the defendants do not challenge the prudential standing of the school children, and those plaintiffs plainly meet the constitutional standing requirements. Thus, there are individual plaintiffs in this case who will carry the suit forward in any event.

Nor can there be serious question about the standing of the organization plaintiffs, which the executive defendants have not challenged. The standing of the plaintiff organizations to bring this suit is consistent with the long line of cases in which organizations have sued to enforce civil rights, civil liberties, environmental interests, etc. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 308 (1985); *Havens Realty Corp. v. Coleman* , 455 U.S. 363, 369 (1982); *Andrus v. Sierra Club*, 442 U.S. 347, 352, 353 & n.8 (1979); *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994); *Medical Ctr., Inc.*, 657 F.2d at 1322.

Therefore, this situation is analogous to that presented in *Village of Arlington Heights v. Metropolitan Housing*

Development Corp., 429 U.S. 252 (1977). There, a real estate development corporation challenged the local authority's refusal to rezone a particular parcel of land to allow the construction of racially integrated housing. The Supreme Court found that the corporation met the constitutional standing requirements but was less certain that the corporation met prudential standing requirements given that the corporation had not itself been discriminated against on the basis of race. The Court held that it need not decide the prudential standing question because another of the plaintiffs, an individual, had suffered the discrimination directly. *See id.* at 264 & n.9.

We likewise conclude that we need not decide whether the City and School District plaintiffs meet prudential standing requirements because the individual school children, who have allegedly suffered discrimination directly, and the plaintiff organizations may properly bring this controversy before the federal courts.

III.

As we have stated earlier, we take no position on the merits of the allegations of the complaint. It is indeed a serious matter for plaintiffs to charge that the practices of the Commonwealth of Pennsylvania in funding public schools have a racially disparate effect. But if the charge is serious, so are the inevitable effects if the charge turns out to have merit. We need no long list of citations to note the widespread recognition of the importance of a good public school education for all of our young people -- rich and poor, black and white. Horace Mann, the great educator, wrote "Education, . . . beyond all other devices of human origin, is the great equalizer of the conditions of men, -- the balance-wheel of the social machinery."

We will reverse the order of the District Court dismissing the complaint, and remand for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 98-1223

HUTTON, J. November 18, 1998

Presently before this Court is the Defendants' Motion to Dismiss the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (Docket No. 7), the Plaintiffs' response thereto (Docket No. 12), the Defendants' reply thereto (Docket No. 15), the Defendants' Supplemental Motion to Dismiss (Docket No. 25), the Motion to Dismiss of the Legislative Intervenors (Docket No. 16), the Plaintiffs' response thereto (Docket No. 18), the Brief of Legislative Intervenors for Judgment on the Pleadings (Docket No. 23), the Legislative Intervenors' Reply Brief in Support of their Motion to Dismiss and for Judgment on the Pleadings (Docket No. 24), and the Plaintiffs' Opposition to Intervenors' Supplemental Motion for Judgment on the Pleadings and Defendants' Supplemental Motion to Dismiss Complaint (Docket No. 26). Also before the court is the petition of the United States for leave to participate as *amicus curiae* in this action (Docket No. 13), which motion is granted and Brief of the United States as *Amicus Curiae* in Opposition to Defendant Intervenors' Motion to Dismiss or for Judgment on the Pleadings (Docket No. 20), and United States' Motion to Further Participate as *Amicus Curiae* and to Intervene of Right (Docket No. 21). For the foregoing reasons, the Plaintiffs' Complaint will be dismissed in part.

I. BACKGROUND

On March 9, 1998, Plaintiffs[1] filed the instant action "against officials of the Commonwealth of Pennsylvania who are responsible for the public education of children in the Commonwealth, including those in Philadelphia." (Pls.' Compl. 1.) Plaintiffs charge Defendants[2] with the following: (1) violating Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4a (1994), and certain regulations promulgated by the United States Department of Education's Title VI implementing requirements, 34 C.F.R. §§ 100.3(b)(1) and 100.3(b)(2) (1997) ("Title VI claims") (Count One); and (2) violating the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1994) (Count Two). The Federal Government provides the states with financial assistance to benefit public schools. The Commonwealth distributes these funds to Commonwealth public school districts, including the Philadelphia School District, based on a statutory funding formula. Plaintiffs allege that Defendants' statutory funding formula discriminates against the students of Philadelphia based on race, color and national origin. (Pls.' Compl. 2.) Consequently, Plaintiffs

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[1] The Plaintiffs include: "Students who attend public school in Philadelphia, their parents and guardians, and organizations that represent their interests ('Students and Organization Plaintiffs'); the School District of Philadelphia, the Board of Education of the School District of Philadelphia, and officials who lead the School District ('School District Plaintiffs'); and the Mayor of the City of Philadelphia ('City Plaintiffs')". (Pls.' Compl. ¶ 1).

[2] The Plaintiffs have named the following parties as Defendants: 1) Thomas J. Ridge, the Governor of the Commonwealth of Pennsylvania; 2) Dr. James Gallagher, Chairperson of the Board of Education for the Commonwealth of Pennsylvania; 3) Dr. Eugene Hickok, the Secretary of Education for the Commonwealth of Pennsylvania; and 4) Barbara Hafer, the Treasurer of the Commonwealth of Pennsylvania.

seek declaratory, injunctive and other appropriate relief to stop further alleged discrimination. (Pls.' Compl. 3.)

The Plaintiffs allege that the Commonwealth's statutory public school funding formula has a disparate impact on the school children of Philadelphia, the majority of whom are poor and non-white, in violation of Title VI and § 1983. The Plaintiffs allege that over seventy-five percent of the students that the Philadelphia School District is charged with educating are non-white, that in fiscal year 1996 approximately forth-six percent of the children attending schools in the Philadelphia School District could be classified as poor because they were part of families receiving Aid to Families with Dependent Children, and that in fiscal year 1996, eighty percent of the students in the Philadelphia School District were from families eligible for free or subsidized meals. The Plaintiffs further allege that changes in the funding formula in the last several years have favored majority white school districts over majority non-white school districts.

On May 4, 1998, the Defendants filed the instant motion moving this Court for an Order dismissing the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Defendants' filed their Opposition to Defendants' Motion to Dismiss Complaint on June 17, 1998. On June 29, 1998, the Defendants filed a Reply Memorandum in Support of its Motion to Dismiss Complaint. On July 6, 1998, the Legislative Intervenors[3] filed their Motion to Dismiss. The Plaintiffs filed their response thereto on August 20, 1998.

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[3] On June 3, 1998, this Court granted the uncontested motion to intervene by movants Representative Matthew J. Ryan, Senator Robert C. Jubelirer, Representative Jess M. Stairs and Senator James J. Rhoades (collectively, the "Legislative Intervenors").

On October 7, 1998, Legislative Intervenors filed a Motion for Judgment on the Pleadings. The Legislative Intervenors filed their Reply Brief in Support of their Motion to Dismiss and for Judgment on the Pleadings on October 9, 1998. On October 15, the Defendants filed their Supplemental Motion to Dismiss. On November 6, 1998, the Plaintiffs filed their Motion in Opposition to Legislative Intervenors' Motion for Judgment on the Pleadings and Defendants' Supplemental Motion to Dismiss. It should also be noted that on June 13, 1998, the United States filed their Petition for Leave to Participate as Amicus Curiae in this action. They also filed a Brief as amicus curiae in opposition to Legislative Intervenors' Motion to Dismiss or for Judgment on the Pleadings and Motion to Further Participate as Amicus Curiae and to Intervene of Right on September 21, 1998.

II. DISCUSSION

A. Defendants' Motion to Dismiss the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure

1. Standard Under Rule 12(b)(6)

Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Accordingly, the plaintiff does not have to "set out in detail the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957) (emphasis added). In other words, the plaintiff need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id. (emphasis added).

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),[4] this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). The court will only dismiss the complaint if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc., 492 U.S. at 249-50 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

2. Analysis of Plaintiffs' Claims

In the present motion, the moving Defendants have raised four general issues. First, they assert that all of the Plaintiffs' claims are barred by the final judgment of the Commonwealth Court of Pennsylvania in Marrero by Tabales v. Com., 709 A.2d 956 (Pa. Cmwlth. Mar. 2, 1998), under the doctrine of claim preclusion. Second, they argue that the Plaintiffs have failed to state a claim under

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[4] Rule 12(b)(6) provides that:

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .

Fed. R. Civ. P. 12(b)(6).

Title VI because any implied cause of action created by Title VI extends only to suits against institutional recipients of federal funds and not to individuals. Third, the Defendants allege that Count Two fails to state a claim under 42 U.S.C. § 1983 because Title VI's comprehensive enforcement scheme precludes the Plaintiffs' claim. Finally, they contend that the City of Philadelphia, the School District of Philadelphia, the Board of Education of the School District of Philadelphia, Edward G. Rendell, David W. Hornbeck and Floyd W. Alston are not "persons" protected by Title VI. The Court will address each of the Defendants' arguments in turn.

a. Res Judicata

The doctrine of res judicata, or claim preclusion, gives a prior judgment dispositive effect, and bars subsequent litigation based on any claim that was, or could have been, raised in the prior proceeding. See Board of Trustees of Trucking Employers v. Centra, 983 F.2d 495, 504 (3d Cir. 1992). This is true regardless of whether the prior decision was correctly decided, see, e.g., Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981), as the doctrine exists precisely to draw the line at which the priorities of the legal system shift from accuracy to finality. The doctrine accepts the risk of inaccuracy in the individual case in exchange for what courts have determined to be greater benefits--repose and the reliability of final judgments over time, and across the entire legal system. See generally 18 Charles A. Wright, Arthur R. Miller, et al., Federal Practice and Procedure 4403 (2d ed. 1996).

To establish the affirmative defense of res judicata, the party asserting it must establish that: (1) the first suit resulted in a final judgment on the merits; (2) the second

suit involves the same parties or their privies; and (3) the second suit is based on the same cause of action as the first. See United States v. Athlone Indus., Inc., 746 F.2d 977, 983 (3d Cir. 1984); Harding v. Duquesne Light Co., 1995 WL 916926, *2 (W.D. Pa. Aug. 4, 1995). The Plaintiffs argue that Marrero was not a decision on the merits, that this matter does not involve the same parties as in Marrero or the same cause of action. (See Pls.' Mot. in Opp'n. at 10.). In sum, the Plaintiffs argue that the Defendants fail to satisfy even one of the three elements necessary to successfully assert claim preclusion. (Id.)

Collateral estoppel is inappropriate because the Defendants fail to satisfy the first requirement set forth in Athlone, thus, this Court need not consider the Defendants' other arguments. Athlone, 746 F.2d at 983. The Commonwealth Court's "Order" in Marrero was not a "final judgment on the merits." See Marrero, 709 A.2d at 966. Indeed, the court dismissed the action for presenting a nonjusticiable political question only after stating that "we are precluded from addressing the merits of the claims underlying the instant action as the resolution of those issues have been solely committed to the discretion of the General Assembly Under Article 3, Section 14 of the Pennsylvania Constitution." Id. Clearly, the court never reached the merits of the Plaintiffs' civil rights claims. The doctrine of res judicata does not apply where, as here, the court did not render a final adjudication on the merits of the prior action. See Wade v. City of Pittsburgh, 765 F.2d 405, 410 (3d Cir. 1985) (finding that a state court decision granting summary judgment to a municipality on the basis of statutory immunity did not preclude a subsequent federal action on the same incident); Superior Oil Co. v. City of Port Arthur, Tex., 553 F. Supp. 511, 512 (E.D. Tx. 1982) (holding that the lower court's finding that the claim

presented a political question was a jurisdictional decision, thus not a judgment on the merits and will not serve as a bar under res judicata principles), rev'd on other grounds, 726 F.2d 203 (5th Cir. 1984); see also Talley v. Southeastern Pennsylvania Transp. Auth., No. CIV. A.93-3060, 1993 WL 496702, at *3 (E.D. Pa. Nov. 30, 1993) (holding that res judicata does not apply to bar second cause of action where prior wrongful termination action was dismissed with prejudice for failure to exhaust administrative remedies) (citing Solar v. Merit Sys. Protection Bd., 600 F. Supp. 535, 536 (S.D. Fla. 1984) (same)).

b. Title VI of the Civil Rights Act of 1964

Section 601 of Title VI of the Civil Rights Act of 1964 provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. Section 602 of Title VI, 42 U.S.C. § 2000d-1, instructs federal agencies to promulgate regulations interpreting Title VI. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 340 (1978) (Brennan, J., concurring and dissenting). The statute conditions an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds. See Guardians Assn. v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 599 (1983) (opinion of White, J.); id., at 609 (Powell, J., concurring in judgment); cf., Pennhurst State

School and Hospital v. Halderman, 451 U.S. 1, 17 (1981). The ultimate sanction for non-compliance is the termination of financial assistance. 42 U.S.C. § 2000d-1. The "primary objective" of Title VI is to ensure "that funds of the United States are not used to support racial discrimination" but "are spent in accordance with the Constitution and the moral sense of the Nation." Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 633 (1984) (citing 110 Cong. Rec. 6544 (1964) (remarks of Sen. Humphrey)).

The Defendants assert that Count I fails to state a claim because any implied cause of action created by Title VI extends only to suits against institutional recipients of federal funds and not to individuals. The Defendants argue that the Plaintiffs' Complaint is fatally flawed because it names Defendants Ridge, Gallagher, Hickok and Hafer. This Court must disagree.

In their Complaint, the Plaintiffs allege to sue Defendants Ridge, Gallagher, Hickok and Hafer in their official and individual capacities, but assert that they seek only injunctive and declaratory relief against the Defendants in their individual capacities. (Pls.' Complaint ¶¶ 27, 28, 29, 30 and 31.) The Plaintiffs allege that these Defendants are the key Pennsylvania officials who accept federal financial assistance for public school education, thereby incurring the obligations of Title VI and its regulations. (Id.) The Plaintiffs contend that these officials choose, set and administer the policies and practices of public education finance in Pennsylvania, which discriminate on the basis of race, color and national origin. (Id.) The Court finds that the Plaintiffs' suit against Defendants Ridge, Gallagher, Hickok and Hafer in their official capacities "is no different from a suit against the

State itself." Hafer v. Melo, 502 U.S. 21, 26 (1991); see discussion infra Part II.B.4.b.

c. 42 U.S.C. 1983

In Count Two of their Complaint, the Plaintiffs assert that the Defendants have violated § 1983 by discriminating on the basis of race, color or national origin in the educational opportunities and funding system they provide. The Defendants make two arguments challenging the validity of the Plaintiffs' claims arising under § 1983. First, the Defendants argue that the Plaintiffs cannot assert a claim under § 1983 based on Title VI because such a claim is precluded by Title VI's comprehensive enforcement scheme. Second, the Defendants assert that the Plaintiffs cannot circumvent the requirements of a Title VI claim by asserting a § 1983 claim based upon a violation of Title VI. This Court finds that the Plaintiffs have failed to satisfy a prima facie case under § 1983, and therefore are not entitled to protection under that statute.

A § 1983 action has two essential elements: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. 42 U.S.C. § 1983.[5] Neither a state nor its officials acting in their

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[5] Section 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suite in equity, or

official capacities are "persons" under §1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989). Moreover, "governmental entities that are considered 'arms of the State'" are not persons under 1983. Id. at 70.

In Fitchik v. New Jersey Transit Rail Operations, Inc., the United States Court of Appeals for the Third Circuit listed the factors a court must consider when determining whether an entity is an "arm of the State" under Will:

> (1) Whether the money that would pay the judgment would come from the state (this includes three . . . factors-whether payment would come from the state's treasury, whether the agency has the money to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts);
> (2) The status of the agency under state law (this includes four factors-how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation); and
> (3) What degree of autonomy the agency has.

873 F.2d 655, 659 (3d Cir.), cert. denied, 493 U.S. 850 (1989); see Bolden v. SEPTA, 953 F.2d 807, 814-16 (3d Cir. 1991), cert. denied, 504 U.S. 943 (1992). The Third Circuit has "repeatedly held that the most important factor in determining whether an entity is an 'arm of the State' . . .

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other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

is 'whether any judgment would be paid from the state treasury.'" Independent Enters., Inc. v. Pittsburgh Water and Sewer Auth., 103 F.3d 1165, 1172 (3d Cir. 1997) (quoting Fitchik, 873 F.2d at 659).

In the instant case, the Plaintiffs have named the following parties as Defendants: 1) Thomas J. Ridge, the Governor of the Commonwealth of Pennsylvania; 2) Dr. James Gallagher, Chairperson of the Board of Education for the Commonwealth of Pennsylvania; 3) Dr. Eugene Hickok, the Secretary of Education for the Commonwealth of Pennsylvania; and 4) Barbara Hafer, the Treasurer of the Commonwealth of Pennsylvania. Suits against state officials in their official capacity should be treated as suits against the State. See Hafer v. Melo, 502 U.S. 21, 26 (1991) (finding that although state officials literally are persons, an official-capacity suit against a state officer "is not a suit against the official but rather is a suit against the official's office"); Monell, 436 U.S. at 690 n.55 (finding that local government officials sued in their official capacities are "persons" under § 1983 in those cases in which a local government would be suable in its own name); see also Christy v. Pennsylvania Turnpike Comm'n, 54 F.3d 1140, 1143, n.3 (3d Cir. 1995) (finding that a suit against the individual defendants in their official capacities is the same as a suit against the Pennsylvania Turnpike Commission). As officials of the Commonwealth of Pennsylvania who have been sued for actions taken while in their official capacities, Ridge, Hickok and Hafer are not "persons" under § 1983. Furthermore, because the Board of Education's ("Board's") funding comes directly from the Commonwealth of Pennsylvania, neither the Board nor Gallagher are "persons" under § 1983. See 61 Pa. Cons. Stat. Ann. 331.2 (West Supp. 1996); 71 Pa. Cons. Stat. Ann. 230(b) (West 1990). "[T]he Board enjoys no

financial independence from the Commonwealth." Ahmad v. Burke, 436 F. Supp. 1307, 1311 (E.D. Pa. 1977). Accordingly, any judgment against the Board would be "paid from the state treasury." This weighs heavily in favor of the Board's "being considered 'an arm of the State.'" Independent Entrs., 103 F.3d at 1173.

Moreover, the second and third factors also weigh in favor of this conclusion. Pennsylvania courts have found that the Board enjoys sovereign immunity. Reiff v. City of Philadelphia, 365 A.2d 1357, 1358 (Pa. Commw. Ct. 1976). Moreover, "[t]he Board's powers, in short, are not those of an agency 'sufficiently distinct and independent from the state as not to be considered a part of the state.'" Ahmad, 436 F. Supp. at 1311 (quoting Flesch v. Eastern Pennsylvania Psychiatric Inst., 434 F. Supp. 963, 976 (E.D. Pa. 1977)).

Accordingly, this Court finds that the Board is an "arm of the State," and thus neither the Board nor Gallagher, its Chairperson, are persons under § 1983. As Judge Edmond V. Ludwig recently stated:

> plaintiff's claim against the Pennsylvania Board of Probation and Parole must be dismissed. As an agency of the Commonwealth of Pennsylvania, a suit against the Board of Probation and Parole is, in essence, a suit against the Commonwealth. The Supreme Court has held that a state may not be sued under § 1983 for either damages or injunctive relief. Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989); see also Abdul-Akbar v. Watson, 775 F. Supp. 735 (D. Del. 1991).

Carotenuto v. Angelli, No.CIV.A.95-1981, 1995 WL 217619, at * 1 (E.D. Pa. Apr. 12, 1995); See Kubis v. Pennsylvania Bd. of Probation and Parole, No.CIV.A.95-5875, 1996 WL 253324, at * 4 (E.D. Pa. May 14, 1996); McCullough v. Pennsylvania Bd. of Probation and Parole, No.CIV.A.85-1640, 1985 WL 2843, at *1 (E.D. Pa. Oct. 2, 1985) (finding Board "is not a 'person' for purposes of 1983 action" and "as a state agency . . .is protected by the Eleventh Amendment"). Therefore, the Plaintiffs' claims against the Defendants under § 1983 must be dismissed.

d. Persons Protected Under Title VI

The Defendants do not challenge the standing of the Students and Organization Plaintiffs to sue under Title VI. The Defendants, however, challenge the standing of the City and School District Plaintiffs. The Defendants argue that the City of Philadelphia, the School District of Philadelphia and the Board of Education of the School District of Philadelphia are political subdivisions, and therefore not entitled to protection under Title VI. Furthermore, the Defendants argue that Edward G. Rendell, David W. Hornbeck and Floyd W. Alston have brought their purported claims in their official capacities, not in their individual capacities. The Defendants contend that because these Plaintiffs are suing only in their official capacities, they have no greater ability to proceed against the Defendants than the political subdivisions they represent. This Court must agree.

To this Court's knowledge, the Third Circuit has not yet considered the issue of whether Title VI creates a non-private cause of action. See District of Philadelphia v. Pennsylvania Milk Marketing Bd., 877 F. Supp. 245, 251 n.3 (E.D. Pa. 1995) (stating that the Third Circuit had not

yet decided whether a school district would be permitted to sue the state for Constitutional violations). Further, the Third Circuit has not yet decided whether a city has standing under Title VI to sue the state. This Court, therefore, looks to other circuits for guidance.

The Eleventh Circuit has stated that "[n]othing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a 'person' with rights under this statute." United States v. Alabama, 791 F.2d 1450, 1454 (11th Cir. 1986) (finding that state university has no standing to sue under Title VI); see DeKalb County School Dist. v. Schrenko, 109 F.3d 680, 689 (11th Cir. 1997) (finding that political subdivision of a state, such as the DeKalb County School District and its Board of Education, may not maintain a suit for a breach of Title VI against the State in federal court). See also Stanley v. Darlington County School Dist., 84 F.3d 707, 717 n.2 (4th Cir. 1995) (holding that Title VI does not authorize a political subdivision of a state to sue the state itself).

Title VI provides for a comprehensive scheme of administrative enforcement, and the Supreme Court has implicitly recognized a private right of action for individuals injured by a Title VI violation. Alabama, 791 F.2d at 1454 (citing Cannon v. Univ. of Chicago, 441 U.S. 677, 696-97 (1978)). "Absent any indication of Congressional intent to grant additional rights under this statute to [political subdivisions] against the state, [this Court] declines to infer such a right of action by judicial fiat." Id. In the instant matter, the City of Philadelphia, the School District of Philadelphia and the Board of Education of the School District of Philadelphia are political subdivisions. Accordingly, they are not "persons" under Title VI, and their claims must therefore be dismissed

pursuant to Rule 12(b)(6). Furthermore, Rendell, Hornbeck and Alston have brought their purported claims in their official capacities, not in their individual capacities. (See Pls.' Complaint ¶¶ 20, 25.) Because they have sued the Defendants in their official capacities, they have no more standing under Title VI than the political subdivisions that they represent. Breard v. Greene, 118 S. Ct. 1352, 1356 (1998) (finding that the Consul General, acting only in his official capacity, had no greater ability to proceed under § 1983 than did the country he represented). Similarly, the City and School Plaintiffs are not "persons" under Title VI, and their claims must therefore be dismissed pursuant to Rule 12(b)(6).

B. Motion to Dismiss or for Judgment on the Pleadings of Intervenors Jubelirer, Ryan, Rhoades and Stairs

1. Standard of Review Under Rule 12(b)(1)

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a district court can grant a dismissal based on the legal insufficiency of a claim. Dismissal is proper only when the claim clearly appears to be either immaterial and solely for the purpose of obtaining jurisdiction, or is wholly insubstantial and frivolous. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1408-09 (3d Cir.), cert. denied, 501 U.S. 1222 (1991). When the subject matter jurisdiction of the court is challenged, the party that invokes the court's jurisdiction bears the burden of persuasion. Kehr Packages, 926 F.2d at 1409 (citing Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir.1977)). Moreover, the district court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. McCarthy v. United States, 850

F.2d 558, 560 (9th Cir. 1988) (citations omitted), cert. denied, 489 U.S. 1052 (1989).

2. Standard of Review Under Rule 12(b)(6)

See discussion supra Part II.A.1.

3. Standard of Review Under Rule 12(c)

A motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is treated under the same standard as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Regalbuto v. City of Philadelphia, 937 F. Supp. 374, 376-77 (E.D. Pa. 1995), aff'd, 91 F.3d 125 (3d Cir.) (table), cert. denied, 117 S. Ct. 435 (1996); Constitution Bank v. DiMarco, 815 F. Supp. 154, 157 (E.D. Pa. 1993). Consequently, judgment under Rule 12(c) will only be granted where the moving party has clearly established that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law. Regalbuto, 937 F. Supp. at 377 (citing Inst. for Scientific Info., Inc. v. Gordon and Breach, Science Publishers, Inc., 931 F.2d 1002, 1005 (3d Cir.), cert. denied, 502 U.S. 909 (1991)). Additionally, the district court must view the facts and inferences to be drawn from the pleadings in the light most favorable to the non-moving party. Regalbuto, 937 F. Supp. at 377 (citing Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 406 (3d Cir. 1993)).

4. Analysis of Plaintiffs' Claims

In their Brief in support of their Supplemental Motion for Judgment on the Pleadings, the Legislative Intervenors allege that Count One of the Complaint fails to state a

claim because § 602 of Title VI does not allow a private cause of action and none should be implied. In their Motion for Judgment on the Pleadings, the Legislative Intervenors assert that the Eleventh Amendment bars the Plaintiffs' claims against the Defendants in their official capacities. The Legislative Intervenors also argue that the Complaint fails to state a claim for disparate impact under existing caselaw. First, the Court will consider whether a private cause of action exists under Title VI. Second, the Court will review whether the Claim brought by the Plaintiffs is barred by the Eleventh Amendment. Finally, the Court will consider whether the Complaint sucessfully states a claim for disparate impact under Title VI.

a. Private Cause of Action

The Supreme Court has stated that it is a "widely accepted assumption that Title VI creates a private cause of action." Cannon v. Univ. of Chicago, 441 U.S. 677, 703 n.33 (1979). In Cannon, the Court found that Title IX of the Education Amendments of 1972 created a private right of action for victims of discrimination in education. Id. at 703. In making that holding, the Court stated that it had "no doubt that Congress ... understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination." Id. The Cannon Court recognized that Title IX of the Civil Rights Act of 1964 "was patterned after Title VI...." Id. at 694. "Thus, the courts have consistently held the language of Cannon to be applicable in discussions of Title VI." Chowdhury v. Reading Hosp. & Med. Center, 677 F.2d 317, 320 (3d Cir. 1982) (citing Pushkin v. Regents of the Univ. of Colorado, 658 F.2d 1372 (10th Cir. 1981); Camenisch v. Univ. of Texas, 616 F.2d 127 (5th Cir. 1980), vacated on other

grounds and remanded, 451 U.S. 390 (1981); N.A.A.C.P. v. Med. Ctr., Inc., 599 F.2d 1247 (3d Cir. 1979)).

The Third Circuit recently confirmed that "[a] private right of action exists under section 601, but this right only reaches instances of intentional discrimination as opposed to instances of discriminatory effect or disparate impact." Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 929 (3d Cir. 1997). In this case, Plaintiffs allege discrimination solely on the basis of disparate impact. (See Pls.' Complaint at 1.) Therefore, Plaintiffs cannot avail themselves of a private right of action under § 601.

Plaintiffs do not specify, however, whether the Complaint should be read to imply a cause of action pursuant to § 601 or § 602 of Title VI. Section 602 authorizes and directs federal agencies to promulgate regulations implementing the provisions of § 601. See 42 U.S.C. § 2000d-1. Pursuant to § 602, the Department of Education issued regulations which provide in relevant part:

> Specific discriminatory actions prohibited. (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin: (I) Deny an individual any service, financial aid, or other benefit provided under the program; (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program .... (2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which

> will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

34 C.F.R. §§ 100.3(b)(1) and 100.3(b)(2).

Although the Plaintiffs' Complaint does not actually cite either § 601 or § 602, as Judge Easterbrook of the Seventh Circuit observed: "Instead of asking whether the complaint points to the appropriate statute, a court should ask whether the relief is possible under any set of facts that could be established consistent with the allegations." Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073, 1078 (7th Cir. 1992) (citing, e.g., Conley v. Gibson, 355 U.S. 41 (1957)); see Fed. R. Civ. P. 8. Thus, this Court reads the Complaint to assert a cause of action under § 602.

The Legislative Intervenors contend that, like § 601, § 602 does not afford the Plaintiffs a private right of action. In Alexander, the Supreme Court interpreted Guardians as holding that "actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title

VI." Alexander, 469 U.S. at 293. In Chester Residents, however, the Third Circuit determined that neither Guardians nor Alexander definitively settled the availability of a private right of action under § 602.

Nevertheless, after conducting its own analysis, the Third Circuit concluded that "private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964." Chester Residents, 132 F.3d 925, 937. Pursuant to § 602, the Department of Education has issued regulations providing a private cause of action based on discriminatory impact. See 34 C.F.R. §§ 100.3(b)(2) and 100.3(b)(3). (prohibiting certain actions "which have the effect" of discriminating); see also Elston v. Talledega County Bd. of Educ., 997 F.3d 1394, 1407 n.12 (11th Cir. 1993) (evaluating merits of disparate impact claim under 34 C.F.R. §§ 100.3(b)(2) and 100.3(b)(3)). Consequently, the Plaintiffs' claim of discrimination by disparate impact under § 602 and 34 C.F.R. §§ 100.3(b)(2) and 100.3(b)(3) will not be dismissed under the theory that Title VI does not create a private cause of action.

b. Eleventh Amendment Immunity

The Eleventh Amendment bars suits against the State both when it is the named party and when it is the party in fact. Scheuer v. Rhodes, 416 U.S. 232, 237 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984). "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . As such, it is no different from a suit against the state itself." Will, 491 U.S. at 71.

In Ex parte Young, the Supreme Court recognized an exception for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities. Ex parte Young, 209 U.S. 123 (1908). The Court has also stated that the exception to the Eleventh Amendment immunity established in Ex parte Young, also permits suits against state officials in their official capacities for ultra vires acts. See Pennsylvania v. Union Gas Co., 491 U.S. 1, 26 (1989). In a recent case, the Supreme Court emphasized "the continuing validity of the Ex parte Young doctrine" and the "presumption" that "in most cases" when a plaintiff seeks prospective relief in federal court against state officers "ordinarily" the Eleventh Amendment is no bar. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 117 S. Ct. 2028, 2034, 2038, 2040 (1997).

The Plaintiffs claim that the Eleventh Amendment does not bar their suit as one against the State because their case falls within the Ex parte Young exception to Eleventh Amendment immunity. The Plaintiffs claim that because they sue the Defendants in both their individual and official capacities, and seek to preclude the Defendants from continuing violations of federal law, their suit falls within the exception to Eleventh Amendment immunity established in Ex parte Young. This Court must agree.

Accepting as true the facts alleged in the Complaint and all reasonable inferences that can be drawn from them as proscribed by Rule 12(b)(6), this Court must find that the instant action is solely an official capacity suit. The distinction between official-capacity and personal-capacity suits is, by all accounts, a difficult one. See Kentucky v. Graham, 473 U.S. 159, 165 (1985) ("[T]his distinction

apparently continues to confuse lawyers and lower courts.").

> [T]he distinction between official-capacity suits and personal-capacity suits is more than "a mere pleading device." . . . State officers sued for damages in their official capacity are not "persons" for purposes of the suit because they assume the identity of the government that employs them . . . . By contrast, officers sued in their personal capacity come to court as individuals. A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term "person."

Hafer v. Melo, 502 U.S. 21, 27 (1991).

The Supreme Court has stated that official-capacity suits "'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" Kentucky v. Graham, 473 U.S. 159, 165 (1985) (quoting Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658, 690, n.55 (1978)). Suits against state officials in their official capacity therefore should be treated as suits against the State. See Hafer v. Melo, 502 U.S. 21, 26 (1991) (finding that although state officials literally are persons, an official-capacity suit against a state officer "is not a suit against the official but rather is a suit against the official's office"); Monell, 436 U.S. at 690 n.55 (finding that local government officials sued in their official capacities are "persons" under § 1983 in those cases in which a local government would be suable in its own name); see also Christy v. Pennsylvania Turnpike Comm'n, 54 F.3d 1140, 1143, n.3 (3d Cir. 1995) (finding that a suit against the individual defendants in their official capacities is the same as a suit against the Pennsylvania Turnpike Commission).

Indeed, when officials sued in this capacity in federal court die or leave office, their successors automatically assume their roles in the litigation. Graham, 473 U.S. at 165 (citing Fed. R. Civ. P. 25(d)(1); Fed. R. App. P. 43(c)(1)). Thus, the Plaintiffs' suit against Defendants Ridge, Gallagher, Hickok and Hafer in their official capacities "is no different from a suit against the State itself." Hafer, 502 U.S. at 26; see Breard v. Greene, 118 S. Ct. 1352, 1356 (1998) (finding that action brought by Consul General, acting only in his official capacity, could be nothing other than an official capacity suit); Byrd v. Raines, 521 U.S. 811, 2323 (1997) (Souter, J., concurring) (stating that "the Court is certainly right in concluding that appellees sue not in personal capacities, but as holders of seats in the Congress"); Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1057 (1997) (upholding the district court's ruling that suit brought against the Governor in her individual and official capacities was an official capacity suit).

A plaintiff can, however, bring a claim against a state official in his or her official capacity despite the Eleventh Amendment if the plaintiff is seeking prospective injunctive relief. See Quern v. Jordan, 440 U.S. 332, 337 (1979); Edelman v. Jordan, 415 U.S. 651, 676-77 (1974); Ex Parte Young, 209 U.S. at 155- 56; Helfrich v. Commonwealth of Pennsylvania Dept. of Military Affairs, 660 F.2d 88, 90 (3d Cir.1981); Eckford-El v. Toombs, 760 F. Supp. 1267, 1270 (W.D. Mi.1991). Such claims are allowed because of the legal fiction that the officer being enjoined has acted in an ultra vires fashion, and is therefore not really acting in an "official capacity." See Papasan v. Allain, 478 U.S. 265, 276 (1986) (stating that Ex Parte Young "was based on a determination that an unconstitutional state enactment is void and that any action

by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such action is a nullity."); Benning v. Bd. of Regents of Regency Univs., 928 F.2d 775, 778 (7th Cir. 1991) ("In Ex Parte Young, the Supreme Court authorized a federal court injunction against a state official based upon the theory that his violation of federal law stripped him of his official authority."); Laskaris v. Thornburgh, 661 F.2d 23, 26 (3d Cir. 1981); cf. Ex Parte Young, 209 U.S. at 159.

In the instant matter, the Plaintiffs have made claims for injunctive relief. It is not clear at this juncture whether such relief would truly be prospective and therefore not barred by the Eleventh Amendment. See Papasan, 478 U.S. at 278; Hutto v. Finney, 437 U.S. 678, 690 (1978) ("the difference between retroactive and prospective relief 'will not in many instances be that between day and night.'") (quoting Edelman v. Jordan, 415 U.S. 651, 667 (1974); Laskaris, 661 F.2d at 26; cf. Benning, 928 F.2d at 778. Accordingly, at this juncture, this Court cannot find that the Plaintiffs' claims are barred by the Eleventh Amendment.

c. Disparate Impact

The Plaintiffs base their claim on the federal Department of Education's regulations implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, et seq. In their Complaint, the Plaintiffs allege discrimination solely on the basis of disparate impact. (See Pls.' Complaint at ¶ 1.) The Plaintiffs assert, in substance, that the discriminatory impact arises because the uniformly applied state formula for allocating basic education funds among the 501 school districts does not bring about the

same result in Philadelphia as it might in another, more affluent district, because of Philadelphia's special needs. The Plaintiffs' factual allegations, even when assumed to be true for purposes of this motion, do not, as a matter of law, state a disparate-impact claim. The Plaintiffs' Complaint is merely a "we-need-more-money" allegation of a type that has been held non-actionable.

Courts considering claims under analogous Title VI regulations have held that a plaintiff alleging discrimination in program receiving federal financial assistance must make prima facie showing that alleged conduct has a disparate impact. See New York Urban League, Inc. v. State of N.Y., 71 F.3d 1031, (2d Cir. 1995) (citing Civil Rights Act of 1964, 601, 42 U.S.C.A. 2000d); Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985). "A plaintiff alleging a violation of the [Department of Education] regulations must make a prima facie showing that the alleged conduct has a disparate impact." See Georgia State Conference, 775 F.2d at 1417.

"[A] plaintiff may establish a prima facie case of disparate impact by showing that use of the test causes the selection of applicants ... in a racial pattern that significantly differs from that of the pool of applicants." Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140, 1146 (2d Cir.). Such a showing can be established through the use of statistical evidence which discloses a disparity so great that it cannot reasonably be attributed to chance. See Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977). To establish a prima facie case, the statistical disparity must be sufficiently substantial to raise an inference of causation. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994-95 (1988).

In Alexander v. Choate, 469 U.S. 287 (1985), the Supreme Court applied section 504 of the Rehabilitation Act to a factual situation somewhat similar to that presented here. In that case, Tennessee had reduced from 20 to 14 the number of inpatient hospital days per year that it would reimburse hospitals on behalf of a Medicaid recipient. Statistical evidence showed that disabled persons were more likely than non-disabled persons to require more that 14 days of hospitalization per year, and accordingly challenged the reduction as violative of section 504. The Supreme Court first assumed that a disparate impact would be sufficient to state a claim under section 504. See id. at 299. It held, however, that section 504 requires that "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers." Id. at 301 (emphasis added). The Court noted that the benefit itself "cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." Id.

Applying these standards, the Court determined that the relevant benefit was the 14-day period of covered hospitalization. The Court upheld the benefit limitation, reasoning that it "does not exclude the handicapped from or deny them the benefits of the 14 days of care the State has chosen to provide." Alexander, 469 U.S. at 302. "The reduction in inpatient coverage will leave both handicapped and non-handicapped Medicaid users with identical and effective hospital services fully available for their use, with both classes of users subject to the same durational limitation." Id.

In the instant case, the Plaintiffs do not assert that the Executive Branch Officers calculate funding for the School District any differently than they calculate it for other districts or that the School District receives any less Commonwealth funding than other school districts. Rather, the Plaintiffs want the School District to get more than the statutory formula provides under the theory that factors external to the state subsidy program make education more expensive or funding shortfalls greater in Philadelphia. Under Alexander, this scenario does not state a cause of action for disparate impact. See Alexander, 469 U.S. at 287; see also Cercpac v. Health and Hospitals Corp., 147 F.3d 165, 167 (2d Cir. 1998) (stating that "the disabled do not have a right to more public services than the non-disabled, even if the disabled need them") (quoting Lincoln Cercpac v. Health and Hospital Corp., 977 F. Supp. 274, 280 (S.D. N.Y. 1997)). Likewise, "the [School District] do[es] not have a right to more public services than [other school districts], even if the [School District] need[s] them." Id. Accordingly, the Plaintiffs' claims arising under Title VI and its implementing regulations are dismissed for failure to state a claim.

C. Petition of the United States for Leave to Participate

The United States has filed a petition for leave to participate in this action as amicus curiae. The United States alleges that it has an interest in ensuring that both Title VI and its implementing regulations may be enforced in federal court by private parties. In the interest of justice this Court shall grant the petition.

An appropriate Order follows.

FINAL JUDGMENT

AND NOW, this 18th day of November, 1998, upon consideration of the Defendants' Motion to Dismiss the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (Docket No. 7), the Plaintiffs' response thereto (Docket No. 12), the Defendants' reply thereto (Docket No. 15), the Defendants' Supplemental Motion to Dismiss (Docket No. 25), the Motion to Dismiss of the Legislative Intervenors (Docket No. 16), the Plaintiffs' response thereto (Docket No. 18), the Brief of Legislative Intervenors for Judgment on the Pleadings (Docket No. 23), the Legislative Intervenors' Reply Brief in Support of their Motion to Dismiss and for Judgment on the Pleadings (Docket No. 24), and the Plaintiffs' Opposition to Intervenors' Supplemental Motion for Judgment on the Pleadings and Defendants' Supplemental Motion to Dismiss Complaint (Docket No. 26); also before the court is the petition of the United States for leave to participate as amicus curiae in this action (Docket No. 13), Brief of the United States as Amicus Curiae in Opposition to Defendant Intervenors' Motion to Dismiss or for Judgment on the Pleadings (Docket No. 20), and United States' Motion to Further Particpate as Amicus Curiae and to Intervene of Right (Docket No. 21), IT IS HEREBY ORDERED that:

(1) all claims arising under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4a (1994), and certain regulations promulgated by the United States Department of Education's Title VI implementing requirements, 34 C.F.R. §§ 100.3(b)(1) and 100.3(b)(2) (1997) ("Count One") brought by the Plaintiffs[6] against

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[6] The Plaintiffs include: "Students who attend public school in

Defendants: 1) Thomas J. Ridge, the Governor of the Commonwealth of Pennsylvania; 2) Dr. James Gallagher, Chairperson of the Board of Education for the Commonwealth of Pennsylvania; 3) Dr. Eugene Hickok, the Secretary of Education for the Commonwealth of Pennsylvania; and 4) Barbara Hafer, the Treasurer of the Commonwealth of Pennsylvania are DISMISSED with prejudice;

(2) all claims brought by the Plaintiffs arising under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1994) ("Count Two") against Defendants: 1) Thomas J. Ridge, the Governor of the Commonwealth of Pennsylvania; 2) Dr. James Gallagher, Chairperson of the Board of Education for the Commonwealth of Pennsylvania; 3) Dr. Eugene Hickok, the Secretary of Education for the Commonwealth of Pennsylvania; and 4) Barbara Hafer, the Treasurer of the Commonwealth of Pennsylvania are DISMISSED with prejudice; and

(3) the motion of the United States for leave to participate as amicus curiae in this action is GRANTED.

BY THE COURT:

_____

HERBERT J. HUTTON, J.

Philadelphia, their parents and guardians, and organizations that represent their interests ('Students and Organization Plaintiffs'); the School District of Philadelphia, the Board of Education of the School District of Philadelphia, and officials who lead the School District ('School District Plaintiffs'); and the Mayor of the City of Philadelphia ('City Plaintiffs')". (Pls.' Compl. ¶ 1).

APPENDIX C

SECTION 601 OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Section 2000d. Prohibition against exclusion from participation in denial of benefits of, and discrimination under federally assisted programs on ground of race, color or national origin.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

APPENDIX D

SECTION 602 OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Sec. 2000d-1. Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to Congressional committees; effective date of administrative action

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law:

Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

APPENDIX E

SECTION 100.3 OF TITLE 34 OF THE CODE OF FEDERAL REGULATIONS

Sec. 100.3 Discrimination prohibited. (a) General. No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies. (b) Specific discriminatory actions prohibited. (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin: (i) Deny an individual any service, financial aid, or other benefit provided under the program; (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program; (iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program; (iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program; (v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program; (vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee

but only to the extent set forth in paragraph (c) of this section). (vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program. (2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin. (3) In determining the site or location of facilities, an applicant or recipient may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation. (4) As used in this section, the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance. (5) The enumeration of specific forms of prohibited discrimination in this paragraph and paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section. (6)(i) In administering a

program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination. (ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin. (c) Employment practices. (1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the employment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of such individuals, or (iv) to provide remunerative activity to such individuals who because of handicaps cannot be readily absorbed in the competitive labor market. The following, under existing laws, have one of the above objectives as a primary objective: (A) Projects under the Public Works Acceleration Act, Pub. L. 87-658, 42 U.S.C. 2641-2643. (B) Work-study under the Vocational Education Act of 1963, as amended, 20 U.S.C. 1371-1374. (C) Programs assisted under laws listed in appendix A as respects

employment opportunities provided thereunder, or in facilities provided thereunder, which are limited, or for which preference is given, to students, fellows, or other persons in training for the same or related employments. (D) Assistance to rehabilitation facilities under the Vocational Rehabilitation Act, 29 U.S.C. 32-34, 41a and 41b. (2) The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it. (3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries. (d) Indian health and Cuban refugee services. An individual shall not be deemed subjected to discrimination by reason of his exclusion from the benefits of a program limited by Federal law to individuals of a particular race, color, or national origin different from his. (e) Medical emergencies. Notwithstanding the foregoing provisions of this section, a recipient of Federal financial assistance shall not be deemed to have failed to comply with paragraph (a) of this section if immediate provision of a service or other benefit to an individual is necessary to prevent his death or serious impairment of his health, and such service or other benefit cannot be provided except by or through a medical

institution which refuses or fails to comply with paragraph (a) of this section.

(Authority: Sec. 601, 602, 604, Civil Rights Act of 1964; 78 Stat. 252, 253, 42 U.S.C. 2000d, 2000d-1, 2000d-3)

APPENDIX F

SECTION 100.7 OF TITLE 34 OF THE CODE OF FEDERAL REGULATIONS

Sec. 100.7 Conduct of investigations. (a) Periodic compliance reviews. The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part. (b) Complaints. Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee. (c) Investigations. The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part. (d) Resolution of matters. (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in Sec. 100.8. (2) If an investigation does not warrant action pursuant to

paragraph (1) of this paragraph (d) the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing. (e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

(Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1)

APPENDIX G

PENNSYLVANIA BASIC EDUCATION FUNDING FORMULA FOR 1997-1998 SCHOOL YEAR

For the 1997-1998 school year, the Commonwealth shall pay to each school district a basic education funding allocation which shall consist of the following:

(1) An amount equal to the basic education funding allocation for the 1996- 1997 school year pursuant to section 2502.33.[1]

(2) A base supplement payable to qualifying school districts.

(i) To qualify for the base supplement, a school district's 1998-1999 market value/income aid ratio must be equal to or greater than four thousand ten-thousandths (0.4000).

(ii) The base supplement is calculated for qualifying school districts as follows: multiply the school district's 1998-1999 market value/income aid ratio times its 1997-1998 average daily membership; multiply this product times eighty-five million five hundred thousand dollars ($85,500,000); divide the resultant product by the sum of the products of the 1998-1999 market value/income aid ratio times the 1997-1998 average daily membership for all qualifying districts.

(3) A growth supplement is calculated for qualifying school districts as follows: multiply the increase in average daily membership between the 1996- 1997 and 1997-1998 school years times four hundred dollars ($400).

(4) A poverty supplement to qualifying school districts.

(i) To qualify for the poverty supplement, the number of children in low-income families residing in the district for the 1997 calendar year divided by the district's average daily membership for the 1997-1998 school year must be greater than or equal to ten per centum (10%).

(ii) The poverty supplement is calculated for qualifying school districts by multiplying the number of children in low-income families as defined in section 2501(21)[2] residing in the district for the 1997 calendar year times fifty dollars ($50).

(5) Each school district will be guaranteed a minimum increase to be calculated as follows:

(i) Each school district with a 1998-1999 market value/income aid ratio equal to or greater than seven thousand ten-thousandths (0.7000) will receive additional funding, as necessary, so that the sum of the amounts in clauses (2), (3), (4) and (5) will equal at least four per centum (4%) of the amount in clause (1).

(ii) Each school district with a 1998-1999 market value/income aid ratio less than seven thousand ten-thousandths (0.7000) will receive additional funding, as necessary, so that the sum of

the amounts in clauses (2), (3), (4) and (5) will equal at least one per centum (1%) of the amount in clause (1).

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[1] 24 P.S. § 25-2502.33.

[2] 24 P.S. § 25-2501(21).

Nos. 99-527 & 99-574

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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All Respondents are individuals, governmental bodies, or membership organizations. None of the incorporated membership organizations has a parent company or nonwholly owned subsidiary company.

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IN THE

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---

BRIEF IN OPPOSITION

INTRODUCTION

Petitioners, state officials who accept federal funds for public schools, create and knowingly perpetuate a system of public school funding that results in worsening racial disparities, but argue that they are completely insulated from accountability in federal court for their conduct. Their effort to insulate their conduct from review is undeserving of this Court's attention. Petitioners have not presented "compelling reasons," Supreme Court Rule 10, for review by this Court of the carefully reasoned, unanimous opinion of the Third Circuit holding that this case may go forward. The

Third Circuit reversed the dismissal of this case because the District Court "mischaracterized" the allegations of the Complaint and erred in dismissing claims under the United States Department of Education regulation effectuating Title VI of the Civil Rights Act of 1964 and 42 U.S.C. § 1983, but did not presage which side ultimately will prevail. Because Petitioners can cite no Circuit split or conflict with relevant decisions of this Court, and given the very real prospect that this case ultimately will be resolved without the necessity of reaching all, or indeed any, of the questions presented by Petitioners, this Court should decline review now and permit Respondents to develop and present evidence to support their claims.

COUNTERSTATEMENT

A. The Complaint. This Counterstatement is drawn from the Complaint, which must be taken as true on review of a motion to dismiss. *Haddle v. Garrison*, 525 U.S. 121, 119 S. Ct. 489, 491 (1998). Respondents accordingly do not undertake here to correct factual misstatements or to respond to Petitioners' reliance on material outside of the record. *E.g.*, Leg. Pet. 3 n.6. [1]

Respondents are schoolchilden in the Philadelphia Public School District ("the School District") and their parents; organizations that combat racial discrimination in public education and seek sufficient educational support for children in the School District; the School District, its Superintendent and Board of Education; and the Mayor and City of Philadelphia. App. 202a-208a. The School District educates a student body that is nearly 80% African-American, Hispanic, Asian and

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[1] The Petition in No. 99-527, filed by Pennsylvania Legislative Branch officials who intervened as defendants in the District Court, is referenced as "Leg. Pet." "Ex. Pet." refers to the Petition in No. 99-574 filed by Pennsylvania Executive Branch Petitioners. "App." refers to the Appendix to Petition for Writ of Certiorari filed in No. 99-574.

other minority students and that comprises nearly 50% of the minority public school students in Pennsylvania. App. 207a-208a, ¶¶ 23, 24. Minority enrollment in public schools in the rest of Pennsylvania as a whole is only approximately 11%. App. 213a, ¶ 41. The School District's minority composition is known to Pennsylvania officials, who also have knowledge that, more than 25 years ago, state courts and a state agency found the School District was unlawfully segregated by race, with segregated conditions persisting into the 1990s. App. 212a-214a.

Petitioners Ridge, Gallagher, Hickok and Hafer are the Pennsylvania executive branch officials named as defendants in this action. They have responsibility for administering public education in Pennsylvania and accept federal funds for that purpose. App. 208a-212a. A group of legislative branch officials -- Petitioners Ryan, Jubelirer, Stairs and Rhoades -- intervened as defendants to support the Executive Petitioners, although the Executive Petitioners claim that Legislative Petitioners do not receive federal funds "and therefore are not subject to Title VI." Ex. Pet. 8.

Pennsylvania provides funding to school districts for public education through a "statutorily established system" that "depends upon a combination of locally generated revenues authorized by the Commonwealth (that rely primarily upon local property taxes), state funds provided by the Commonwealth [t]reasury ('Commonwealth treasury revenues'), and certain federal funds." App. 215a, ¶ 47. Commonwealth treasury revenues consist of a baseline instructional subsidy to public school districts adopted each year, called Basic Education Funding, *id.*, and categorical subsidies distributed to public school districts according to legislative enactments. The terms by which local funding for each Pennsylvania school district may be generated are controlled by state statute, 24 P.S. §§ 6-601 to 6-695, App. 64a-115a; 53 P.S. § 16101. Federal

education funds are appropriated through state legislative and gubernatorial action. *See Shapp v. Sloan*, 391 A.2d 595 (Pa. 1978), *appeal dismissed sub nom. Thornburgh v. Casey*, 440 U.S. 942 (1979).

Pennsylvania's method of funding public education yields racially different results: Funding per child is less in the predominantly minority School District than it is per child in otherwise similarly situated districts that educate predominantly white students. App. 217a-218a, ¶¶ 53, 55. This racial disparity per child exists not just in Philadelphia, but also in other predominantly minority districts in Pennsylvania, *e.g.*, App. 218a, ¶ 55, and has grown over time with respect to both Commonwealth treasury revenues and total revenue. App. 217a-218a, ¶¶ 53, 56.

For example, in 1995-96, for two school districts with the same level of poverty (as measured by Aid to Families with Dependent Children), the school district with higher minority enrollment received $52.88 less Commonwealth treasury revenues per pupil for each increase of 1% in minority enrollment. App. 218a, ¶ 55. In 1990-91, the School District "received 17.2% less [per child in Commonwealth treasury revenues] than the average of school districts with the same poverty rate." App. 217a-218a, ¶ 53. By 1995-96, this disparity had risen to 33.1% per child. *Id.*

Between 1992 and 1996, total revenues to school districts with 50% or more white students increased by a weighted average of $776 per pupil, while the increase to the School District was only $84 per pupil and the increase to districts with more than 75% minority enrollment was only $149 per pupil. App. 218a, ¶ 56.

These intensifying levels of racial discrimination in funding, and the consequent harm to Respondents, arise not from some inadvertent statistical anomaly, but from Petitioners' funding decisions made, over time, with prior knowledge of those racially discriminatory conse-

quences. App. 215a, ¶ 47; 219a, ¶¶ 59, 60; 223a, ¶ 73; 225a, ¶ 80.

Because the Executive Petitioners receive federal funds, § 601 of Title VI of the Civil Rights Act of 1964 prohibits them from subjecting any person to racial discrimination in public education in Pennsylvania. 42 U.S.C. § 2000d (App. 57a). The United States Department of Education regulation adopted to "effectuate the provisions of section" 601, 42 U.S.C. § 2000d-1 (App. 57a), prohibits providing different services on the basis of race, subjecting an individual to segregation, or utilizing "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race," or which defeat or "substantially impair[] accomplishment of the objectives of the program" for individuals of a particular race. 34 C.F.R. § 100.3(b)(1)(ii),(iii), (2) (App. 59a-60a).

Count I of the Complaint claims that these funding policies and practices violate the Department of Education Title VI regulation in four respects. First, they create a racially discriminatory effect in violation of 34 C.F.R. § 100.3(b)(2):

> The Commonwealth['s] funding policies and practices wrongfully discriminate against African-American, Hispanic, Asian and other minority students in the School District by utilizing criteria and methods that have had the foreseeable effect of subjecting such students to discrimination because of their race, color, or national origin, by disproportionately denying them necessary support for their education, in violation of the Title VI implementing regulations applicable to federal education programs.

App. 223a, ¶73.

Second, the state-established funding system violates the regulatory prohibition against providing "any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from

that provided to others under the program" on the basis of race, since it does not provide "educational opportunity equal to that which children who live in predominantly white school districts receive." App. 222a-223a, ¶¶ 70 (*quoting* 34 C.F.R. § 100.3(b)(1)), 73. Third, the funding system violates the regulatory prohibition on subjecting "an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program," App. 222a, ¶ 70 (*quoting* 34 C.F.R. § 100.3(b)(1)), because Petitioners' "funding policy and practices have the foreseeable, racially discriminatory effect of further isolating the Student Plaintiffs, the School District, and the City by race in the Philadelphia metropolitan area, and of impairing the School District Plaintiffs' ability to provide a thorough and efficient educational system which is racially non-discriminatory and racially non-segregated." App. 223a, ¶ 75. Finally, the objectives of specific federal education programs for which Pennsylvania receives federal funds, "are defeated or substantially impaired in Philadelphia by the Commonwealth['s] challenged racially discriminatory funding policies and practices," in violation of 34 C.F.R. § 100.3(b)(2). App. 222a, ¶ 70; App. 224a, ¶ 77.

In Count II of the Complaint, the student and organization plaintiffs assert a second claim, which goes almost unmentioned by Petitioners. The claim arises under the Civil Rights Act of 1871, 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Because the rights secured by Title VI and the Department of Education regulations are rights, privileges, and immunities secured by the laws of the United States, Pennsylvania officials responsible for the funding of public schools in a manner that violates their obligations under the Title VI regulation are liable in a suit in equity for injunctive relief under § 1983.

The Prayer for Relief requests only declaratory and prospective injunctive relief, prohibiting Petitioners, if they wish to accept future federal funds, "from continuing to implement a system of funding public schools that discriminates against . . . minority children enrolled in" the School District "and that thereby harms" all Respondents. App. 226a-227a.

B. The District Court Decision. The District Court dismissed both Counts of the Complaint with prejudice pursuant to Rule 12 of the Federal Rules of Civil Procedure, on the motions of both groups of Petitioners. App. 32a-56a. On Count I, the District Court concluded that Respondents failed to state a claim for "disparate impact" under the Title VI regulation, because the District Court characterized the Complaint as alleging discrimination based on poverty rather than race and found no allegation "that the School District receives any less Commonwealth funding than other school districts." App. 52a-53a. The District Court further ruled that the School District and City plaintiffs lack "standing" because they are not "persons" protected by Title VI. App. 42a-44a.

The Court next dismissed Count II solely on the ground that the Executive Petitioners named as defendants are not "persons" covered by § 1983, even though the case is one seeking prospective injunctive relief. App. 39a-42a.

The District Court rejected numerous other arguments offered by Petitioners here. In particular, the Court declined to invalidate the Department of Education's

Title VI regulation or to deny a private right of action for prospective injunctive relief to enforce the regulation in federal court. App. 46a-48a. The Court did not address the Legislative Petitioners' contention, raised again before this Court, that the injury alleged in the Complaint is not "redressable" because entities other than Pennsylvania play a role in funding decisions for the public schools. *See* Leg. Pet. i, Question Presented 3. No motion before the District Court raised the third issue presented here by the Executive Petitioners, whether a "generally worded regulation" can support a challenge to discriminatory school funding. Ex. Pet. i, Question Presented 3.

C. The Third Circuit's Ruling. The Third Circuit reversed the District Court's dismissal of both Counts of the Complaint. App. 1a-31a. The unanimous Third Circuit panel concluded that the District Court had "mischaracterized" the Complaint as being "based on economic circumstances rather than race." App. 13a. The Third Circuit held that the Complaint was sufficient to put Petitioners on notice "that less educational funding is provided by the Commonwealth to school districts attended by most non-white students in Pennsylvania than to school districts attended by most white students . . . [and] that the funding disparities injure non-white students by limiting their educational opportunities." *Id.*

Without opining on the merits, the Court concluded that "the plaintiffs should be given the opportunity to offer evidence in support of their claims." *Id.* In so doing, the Court of Appeals recognized the factual complexity of the funding system and the need for factual development in this case:

> We note that there are many components to the Commonwealth's formula, which the plaintiffs allege was changed each year between 1991-92 and 1996-97. Indeed, even after requesting and receiving supplemental briefs from the parties concerning that

> formula, we remain unable to discern with precision the basis on which the Commonwealth funds the school districts. It may be that some of the necessary information will be forthcoming from the defendants' files and employees during discovery.

App. 16a. In an observation ignored here by Petitioners, the Third Circuit also recognized that dismissal was not appropriate because Respondents' allegations of Petitioners' prior knowledge of the racially discriminatory consequences of their actions justified further factual development as to Petitioners' intent. App. 9a-10a n.1.

The Court of Appeals then rejected, as the District Court had before, Petitioners' argument that there is no private right of action to seek prospective injunctive relief to enforce the Title VI regulations. App. 16a-22a. The Court analyzed the issue under well-established Third Circuit precedent that incorporates the test prescribed by this Court in *Cort v. Ash,* 422 U.S. 66 (1975), to determine when a private right of action may be implied under a federal statute. *See Angelastro v. Prudential-Bache Secs., Inc.,* 764 F.2d 939 (3d Cir.), *cert. denied*, 474 U.S. 935 (1985). The Court found the requirements of the *Cort* and *Angelastro* tests satisfied, and noted that its decision was "in keeping with the decisions of the other courts of appeals that have addressed this issue," App. 20a, since the Eleventh Circuit has held that a private right of action exists under regulations enforcing Title VI, *Burton v. City of Belle Glade,* 178 F.3d 1175 (11th Cir. 1999), and other Courts of Appeals have reached the merits of such claims. App. 18a-21a.

The Third Circuit rejected the argument, repeated here, Ex. Pet. 8-14 and Leg. Pet. 6-10, that the Title VI regulations are barred under *Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976), because they "create federal law." App. 21a. The Court of Appeals cited this Court's pronouncements on the Title VI regulations and numerous other federal cases that have implied private rights

of action to enforce regulations "under similar circumstances," including under Title IX. App. 21a-22a. The court explained:

> In each of these cases, the analysis as to whether there was a private right of action to enforce the regulation at issue would not have been necessary if the regulation did not go further than that statute; the private right of action under the particular statute alone would have sufficed.

App. 22a.

The Third Circuit also rejected the District Court's notion that state officials acting in their official capacities are not "persons" within the meaning of § 1983, a proposition that no party defended on appeal. App. 22a-23a. [2]

Finally, the Court rejected the Legislative Petitioners' argument that Respondents, including the parents of children who attend the School District, lack standing because the injury of which they complain is not redressable by the injunction they seek:

> The legislative defendants err in assuming that the injury in this case consists of a lack of adequate funding. Here, the plaintiffs complain that non-white school children in Pennsylvania receive less favorable treatment than their white counterparts because the state funds the school districts most of them attend at a lower level than it does the school districts most white school children attend. A court order directing the state to equalize funding between these

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[2] The Third Circuit also addressed and rejected Petitioners' argument for affirming the dismissal of the § 1983 claim. App. 24a-27a. Petitioners had advanced in the Third Circuit a different ground for affirming the dismissal of the § 1983 claim based on *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981). Petitioners have not renewed that issue here.

> school districts would redress this comparative injury, even if other sources of the school district's income were simultaneously reduced. We therefore conclude that the school children's injury is redressable by court order.

App. 28a (footnote omitted).

Petitioners sought neither rehearing by the panel nor rehearing *en banc*. They did not seek to stay the Third Circuit mandate, so the case is proceeding in the District Court.

REASONS FOR DENYING THE WRIT

Each Petition presents three questions. The first two questions in each Petition are the same: First, whether the regulation adopted under Title VI prohibiting discriminatory effects in programs receiving federal funds is authorized by Title VI; second, whether there is a private right of action for prospective injunctive relief to enforce the regulation. Each Petition raises a distinct third question. (Each group of Petitioners apparently could not even convince the other that there are "compelling reasons" for the Court to consider these issues.) The two Petitions accordingly present a total of four questions, considered seriatim below.

None of the four questions is appropriate for the Court's consideration. The Third Circuit's decision reverses dismissal of the Complaint under Rule 12 of the Federal Rules of Civil Procedure, and thus holds only that Respondents may proceed to discovery and proof of their claims. Except in extraordinary cases, this Court does not grant certiorari on a petition that seeks intervention before final judgment in the lower courts. *See Texas v. Hopwood,* 518 U.S. 1033 (1996) (opinion of Ginsburg, J., respecting the denial of the petition for certiorari); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for certiorari); *Brotherhood of*

Locomotive Firemen v. Bangor & Aroostok R.R, 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not ripe for review"); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-259 (1916) (certiorari jurisdiction should be "exercised sparingly" and "except in extraordinary cases, the writ is not issued until final decree"); *American Constr. Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893) ("this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause").

The wisdom of this Court's practice is well illustrated by this case, since the questions presented may never have to be reached by this Court. If Respondents prevail below on their § 1983 claim (Count II), resolution of the private right of action question would become unnecessary. If Respondents prevail under a provision of the Title VI regulation other than the provision challenged in the first question presented in the Petitions, that question would not have to be reached in this case. Moreover, the Third Circuit recognized that factual development of Respondents' allegations could result in a finding of intentional discrimination. App. 9a n.1, citing *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661 (1999). Such a finding would avoid the need to resolve either of the two main issues, or any of the other questions presented.

Nor are there any extraordinary circumstances that justify an exception to the usual rule here. Petitioners seek rulings unsupported by any Court of Appeals and contrary to this Court's precedents. A denial of certiorari will not preclude Petitioners from renewing the questions presented if those issues remain in the case after final judgment. *See Virginia Military Inst.*, 508 U.S. 946 (opinion of Scalia, J., respecting the denial of the petition for certiorari) (denial of a petition before

final judgment "does not preclude [petitioner] from raising the same issues in a later petition, after final judgment has been rendered"); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365-366 n.1 (1973); *Hamilton-Brown Shoe Co.*, 240 U.S. at 257-259.

I. THE COURT SHOULD NOT TAKE THIS CASE TO REVIEW THE VALIDITY OF THE TITLE VI REGULATION PROHIBITING DISCRIMINATORY EFFECTS BECAUSE THE COMPLAINT ALLEGES FAR MORE THAN SUCH EFFECTS, THOSE FACTS SHOULD BE DEVELOPED THROUGH DISCOVERY AND PROOF, AND NO DISPUTE IN THE COURTS OF APPEALS CALLS FOR THIS COURT'S RESOLUTION.

1. The linchpin of Petitioners' attack on the Department of Education Title VI regulation is that a Complaint challenging a school funding system should not be permitted to proceed under a federal regulation prohibiting "disparate impact on a racial or ethnic basis, even if the impact is inadvertent." Leg. Pet. 3. *Accord,* Ex. Pet. 3. The Third Circuit found, however, that Respondents' allegations go far beyond inadvertent consequences (App. 13a-15a); the regulations themselves bar not just discriminatory effects, but also conduct that subjects children to racial segregation or substantially impairs the objectives of federally funded programs for children on the basis of race.

By repeating again and again that this case involves "unintentional disparate impacts on racial or ethnic groups," Leg. Pet. 7; Ex. Pet. 10, Petitioners isolate a single, incomplete aspect of the conduct actually alleged in the Complaint. Petitioners' funding policies have the foreseeable -- and foreseen -- consequence of discriminatorily funding public education and undermining educational opportunities on the basis of race. App. 215a, ¶ 47; 219a, ¶¶ 59, 60; 223a, ¶ 73; 225a, ¶ 80. The system for funding public education in Pennsylvania has

exacerbated segregation of African-American and other minority students in the Philadelphia area, App. 223a-224a, ¶¶ 73, 75, and has impaired the objectives of the federal programs that fund education in Philadelphia. App. 224a, ¶ 77. Count I alleges that Petitioners' conduct violates the Department of Education's Title VI regulation even apart from the provision quoted by Petitioners dealing with racially disparate "effect." App. 222a-225a. *See* 34 C.F.R. § 100.3(b)(1)(ii),(iii), (2); App. 59a-60a (barring federal fund recipients from, on the basis of race, color, or national origin, "[s]ubjectin[g] an individual to segregation or separate treatment," or utilizing criteria or methods of administration that "have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin").

2. As the Third Circuit recognized, App. 9a n.1, further proceedings will focus on applying the various provisions of the regulation to the facts as developed through discovery and proof. The Executive Petitioners attach more than 130 pages of Pennsylvania Statutes to their Petition, App. 64a-197a, and discuss the statutory scheme at length, Ex. Pet. 4-6, suggesting that the case cannot be resolved in their favor until the meaning and significance of these statutes is addressed. The present record, which consists of nothing more than the allegations of the Complaint, is a poor vehicle for testing the scope and validity of one provision of the regulation as applied to such complex facts.

3. Petitioners' portrayal oversimplifies to the point of distortion not just the facts and violations alleged in the Complaint, but the Title VI enforcement mechanism. Both Petitions argue that the Court should take this case to strike down the Department of Education's regulation enforcing Title VI because the regulation "prohibit[s] unintentional disparate impacts on racial or ethnic groups," while "Title VI of the Civil Rights Act of

1964 . . . prohibits only *intentional* racial or ethnic discrimination by recipients of federal funding." Leg. Pet. 7,6. *Accord*, Ex. Pet. 10. Petitioners misunderstand the combined statutory and regulatory design of Title VI. The Title VI regulations were required by a Congress that knew before enactment what such regulations would proscribe. The key compromise that emerged from one of the final markups of the bill that became the Civil Rights Act of 1964 was a mandate that federal agencies promulgate their own regulations for carrying out the general antidiscrimination clause in Title VI, rather than having Congress address through Title VI itself all the intricacies of what conduct would be prohibited. [3]

Secretary Celebrezze, of the Department of Health, Education and Welfare, which was responsible for drafting the original regulations, made clear to Congress that HEW, once given that authority, would take the position that "racial imbalance" -- language which at the time connoted "disparate impact" -- could prompt cutoff of federal funds by HEW. *See Civil Rights: Hearings Before Subcomm. No. 5 of House Comm. on Judiciary*, 88th Cong., 1st Sess. 1519 (1963) ("House Subcomm. Hearings") (testimony of Secretary Celebrezze). Congress developed and passed § 602 of the Act, 42 U.S.C. § 2000d-1, which directs each federal department and agency "to effectuate the provisions of section 2000d [§ 601] of this title . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance. . . ." App. 57a. Such regulations are not effective until approved by the President. *Id.* Congress

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[3] *See Civil Rights: Hearings on H.R. 7152 Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 2652, 2740, 2765-66 (1963) (Attorney General Kennedy); Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 Geo. L. J. 1, 3, 22 (1981).

thus well knew when it passed Title VI that the regulations would address discriminatory "effects," and not only purposeful racial animus.

The regulations developed by HEW as required by § 602 prohibited discriminatory impacts in federally funded programs and were put in place in 1964, the same year Congress passed Title VI. *See* 45 C.F.R. § 80.3 (1964). Comparable regulations have been adopted by over 40 cabinet departments and federal agencies. App. 9a. Seven Presidents -- President Johnson and each of his successors -- have approved such regulations.

Petitioners concede that the validity of the Title VI regulations is a question solely of statutory authority, not constitutional law. Ex. Pet. 1. Everything about Congressional conduct since the regulations were adopted throughout the federal government supports the conclusion that Congress has acquiesced in them. Congress has amended Title VI six times since 1964 without disapproving the regulations. [4] Congress also has passed statutes modeled on Title VI, including a directive for agency regulation to enforce a general ban on discrimination [5] and, in a 1978 statute, a requirement of rules "similar to those established and in effect under [T]itle VI . . . of the Civil Rights Act of 1964." [6] It is fanciful to think that Congress would have built so solidly on the

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[4] *See* Pub.L. 89-750, Title I, § 182, Nov. 3, 1966, 80 Stat. 1209; Pub.L. 90-247, Title I, § 112, Jan. 2, 1968, 81 Stat. 787; Pub.L. 91-230, § 2, Apr. 13, 1970, 84 Stat. 121; Pub.L. 96-88, Title III, § 301(a)(1), Title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692; Pub.L. 99-506, Title X, § 1003, Oct. 21, 1986, 100 Stat. 1845; Pub.L. 100-259, § 6, Mar. 22, 1988, 102 Stat. 31.

[5] *See* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681-82; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

[6] The Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1863.

Title VI foundation if it had not intended the scope of the resulting regulations.

4. This Court also has recognized that the overall Title VI enforcement scheme attacks conduct on the full spectrum from purposeful discrimination motivated by racial animus to discriminatory effects, and in so doing has recognized the validity of the Title VI regulations. In *Guardians Association v. Civil Service Commission,* 463 U.S. 582 (1983), the Court considered a claim that an entry-level employment test had a disparate impact that disadvantaged Hispanic and African-American candidates for the New York City Police Department, in violation of Title VI. The police department received federal funds and thereby bound itself to abide by Title VI and its regulations. *See* 463 U.S. at 642 (Stevens, J., dissenting). At trial, plaintiffs failed to show intentional discrimination, but established "disproportionate impact of the entry-level test on racial minorities." 463 U.S. at 598 (opinion of White, J.). The Court ruled that compensatory relief is available in private Title VI lawsuits in federal court only where discriminatory intent is shown, 463 U.S. at 584 (opinion of White, J.), and recognized the validity of Title VI regulations that, as a condition of federal funding, proscribe conduct with a racially disparate impact. Justice White took care at the end of his opinion announcing the judgment of the Court to identify the following as one of the two propositions adopted by a majority of the Justices:

> [Five Justices] form a majority for upholding the validity of the regulations incorporating a disparate-impact standard.

436 U.S. at 607 n.27. Just two years later, in a unanimous opinion, this Court explained that its earlier decision in *Guardians* "*held* that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI." *Alexander v. Choate,* 469 U.S. 287, 293 (1985) (emphasis added). *Alexander*

and *Guardians* both were decided before the two most recent amendments to Title VI. *See* note 4, *supra*. Congress did not disturb the conclusion that the regulations are valid.

5. Not a single case has declared Title VI regulations invalid, so Petitioners can point to no Circuit split on the issue. Moreover, the validity of the Department of Education regulation is supported by this Court's standard analysis of the scope of regulatory authority. The regulations are reasonably designed to meet the objectives of the enabling statute. *See United States v. O'Hagan*, 521 U.S. 642, 672-673 (1997); *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973). The purpose of the enabling legislation is clear: Congress' core concern in adopting Title VI was to eliminate racial discrimination in programs that receive federal funds, in order to avoid federal subsidization of such conduct and to give its victims meaningful protection. *See Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979). Issues of racial segregation and inequitable educational opportunity were among the most pressing problems of racial injustice that Congress intended to attack in the Civil Rights Act of 1964. House Subcomm. Hearings at 928-930 (message from the President of the United States).

It is undisputed here that Congress has the power under the Spending Clause to condition future grants of federal money on a recipient's refraining from certain conduct, even though such conduct may otherwise be neither illegal nor unconstitutional. *See Rust v. Sullivan*, 500 U.S. 173, 195 n.4 (1991) (regulations prohibiting Title X projects from engaging in abortion counseling are constitutional); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory *and administrative*

directives") (internal citation omitted) (emphasis added). Where a regulation effectuating such a valid congressional purpose goes beyond the literal language of the statute, it is valid as well if it is a "prophylactic measure" designed to meet the specific objectives of the statute. *O'Hagan*, 521 U.S. at 673 (SEC regulations may prohibit non-fraudulent acts if regulations are reasonably designed to prevent fraudulent acts and practices). *See also City of New York v. FCC*, 486 U.S. 57, 64 (1988) (affirming FCC preemption of state law as valid when done to avoid frustration of statute's purpose); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 382 (1969) (sustaining validity of FCC regulations that go beyond statutory mandates where statutory objectives could be circumvented but for the regulations). In analyzing whether regulations are reasonably designed to meet statutory objectives, this Court "must accord the [agency's] assessment 'controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" *O'Hagan*, 521 U.S. at 673 (*quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

The Court will not disturb a regulatory provision "unless it appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned." *City of New York*, 486 U.S. at 64 (quotation omitted).[7] Thus, in addition to the reasons dis-

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[7] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), relied on by Petitioners for its holding that a particular rule promulgated by the Securities and Exchange Commission exceeded the authority of the Securities Exchange Act of 1934, is inapposite because this Court's holding was based in part on its conclusion that the rule was incompatible with the agency's own administrative history and specific language in the legislation. *Id.* at 212-213 & n.32. In this case, however, federal agencies that adopted the HEW regulations, including the Department of Education here, never have wavered from their position that their regulations prohibit practices that have a discriminatory impact. By not defining the term "discrimination" in § 601 of Title VI, and by requiring regulations to "effectuate" that provision in § 602,

cussed above concerning the interlocutory nature of this case as it comes to the Court, this Court should not review the first question presented in both Petitions because Congress knew there would be regulations reaching racially disparate impact when it directed in § 602 that agencies adopt regulations, and such regulations serve the goal of the statute to stop federal financial support for discrimination. [8]

II. THE ISSUE OF WHETHER A PRIVATE ACTION MAY BE BROUGHT SEEKING A PROSPECTIVE INJUNCTION TO ENFORCE TITLE VI REGULATIONS IS NOT WELL-SUITED FOR RESOLUTION IN THIS CASE.

The Petitioners' argument that this Court should take this case to decide the question whether there is a private right of action to enforce Title VI regulations is grounded in the fact that the Court granted certiorari to review that issue in *Seif v. Chester Residents Concerned for Quality Living*, 118 S. Ct. 2296, *writ dismissed as moot*, 119 S. Ct. 22 (1998). This case, however, is not *Chester Residents*.

Chester Residents involved a complaint which relied solely on a private right of action based on the Title VI regulations. [9] Here, however, Count II is based in 42

Congress intended that the agencies have room to develop a definition. *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 119 S. Ct. 1392, 1399 (1999).

[8] Justice Stewart applied this reasoning in his concurring opinion in *Lau v. Nichols*, 414 U.S. 563, 569-571 (1974), to consider "[t]he critical question . . . whether the regulations and guidelines promulgated by HEW go beyond the authority of § 601 [of Title VI]." *Id.* at 571 (Stewart, J., concurring). The Title VI regulations were valid, Justice Stewart concluded, because they were "'reasonably related to the purposes of the enabling legislation.'" *Id.* (*quoting Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268, 280-281 (1969)).

[9] The complaint in *Chester Residents* is reproduced in the Joint Appendix filed in this Court's Docket Number 97-1620.

U.S.C. § 1983. App. 225a. This case will go forward and could be decided in any event on Count II, regardless of whether there is a private right of action to bring Count I.

Moreover, the *Chester Residents* plaintiffs did not specifically allege violations of the further provisions of the Environmental Protection Agency regulations that prohibit federal fund recipients from providing differential service on the basis of race, subjecting individuals to racial segregation, and impairing the objectives of a federally funded program for participants on the basis of race. 40 C.F.R. § 7.35. The comparable provisions in the Department of Education regulation all have been pleaded here. App. 222a-224a.

This case, unlike *Chester Residents*, is not limited to the issue of whether a plaintiff should be permitted to pursue a claim under Title VI regulations simply by alleging a discriminatory effect. Rather, this case further involves allegations that Petitioners acted with full knowledge of a racially disparate impact. App. 215a, ¶ 47; 219a, ¶¶ 59, 60; 223a, ¶ 73; 225a, ¶ 80. When this case reaches judgment, it thus may not even raise the more narrow question of the availability of a private right of action to challenge pure discriminatory effects.

This Court's jurisprudence, moreover, has developed since *Chester Residents* in a way that supports the Third Circuit's conclusion that a private right of action exists. Specifically, the Court recently endorsed the analytic framework used by Justice White in *Guardians*. In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 118 S. Ct. 1989 (1998), the Court held that a private right of action for money damages against a school district will not lie under Title IX of the Education Amendments of 1972, by reason of a teacher's sexual harassment of a student, in the absence of actual knowledge of the conduct on the part of the school district. In describing the contours of private rights of

action to enforce Title IX, the Court, citing to Justice White's opinion in *Guardians,* relied on the contractual framework by which federal fund recipients under Title IX, as under Title VI, [10] accept "an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." 118 S. Ct. at 1997. Under that analysis, knowledge of the harassment by the officials of the entity receiving federal funds is a critical consideration in whether damages are available for an alleged Title IX violation. 118 S. Ct. at 1998.

The Court in *Gebser* recognized, however, that these concerns are absent in cases seeking prospective injunctive relief: "Justice White's opinion announcing the Court's judgment in *Guardians* . . . concluded that the relief in an action [under Title VI] alleging unintentional discrimination should be prospective only, because where discrimination is unintentional, 'it is surely not obvious that the grantee was aware that it was administering the programs in violation of the [condition].' 463 U.S. at 598." *Gebser*, 118 S. Ct. at 1998.

Petitioners never mention *Gebser*, or acknowledge the importance of this principle. Respondents seek only prospective injunctive relief, to require future compliance with the regulation. The Legislative Petitioners thus confuse when they warn that Title VI's abrogation of Eleventh Amendment sovereign immunity is somehow implicated here. Leg. Pet. 22-23. No such issue ever will be presented in this case, because no damages are sought.[11] Under *Gebser*, the analysis of private

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[10] "[Title IX] was modeled after Title VI of the Civil Rights Act of 1964, . . . which is parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs." *Gebser*, 118 S. Ct. at 1997 (citations omitted).

[11] The District Court held that the Eleventh Amendment is no bar to this case because the Complaint seeks only prospective

rights of action is aligned with the remedy sought. A suit for a prospective injunction to enforce federal regulations is far less intrusive than a damages case; this Complaint simply asks that a federal fund recipient be required to do in the future what it already has agreed to do. Leaving the Third Circuit's decision to stand while this case proceeds thus does not risk a flood of damages cases or threaten the role of the states in the federal system, who have been on clear notice of this requirement since 1964. *Cf.* Leg. Pet. 22.

Petitioners urge that such determinations are in the first instance for an expert federal agency, Leg. Pet. 13, Ex. Pet. 16, but they fail to recognize that administrative proceedings need not be exhausted before a suit may be brought under Title VI or Title IX. *See Cannon*, 441 U.S. at 706-708 nn.41 & 42. One of the key reasons the Court reached that conclusion in *Cannon* was that the United States candidly admitted that it could not enforce Title IX alone. *Id.* at n.42. The same is true here. The United States has urged in this case that private suits such as this one "are critical to ensuring optimal enforcement of the mandate of Title VI and the regulations." Brief of the United States as Amicus Curiae (filed February 17, 1999, 3d Cir. Nos. 98-2096, 98-2157) at 1.

Every Court of Appeals that has considered the question has permitted litigants to proceed under Title VI regulations. Petitioners are wrong when they assert that "this case is now the only circuit case to explicitly hold that private plaintiffs may enforce Section 602 disparate-impact regulations." Leg. Pet. 13 n.13. *See also* Ex. Pet. 16. As the Third Circuit observed:

> The Eleventh Circuit has explicitly "recognized an implied private right of action to enforce the regula-

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injunctive relief, which is permitted against state officials under *Ex parte Young*, 209 U.S. 123 (1908). App. 48a-51a. Petitioners did not raise that issue on appeal.

> tions promulgated under section 602 of Title VI," thereby permitting private plaintiffs to "obtain injunctive or declaratory relief by showing, *inter alia*, that the challenged action has a 'disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory.'" *Burton v. City of Belle Glade*, [178 F.3d 1175 (11th Cir. 1999)] (*quoting Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993)); *see also Georgia State Conference* [*of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985)].

App. 20a.

The Third Circuit also cited cases from four other circuits that "reached the merits of disparate impact claims brought by individual plaintiffs under the Title VI regulations," App. 20a, although without explicitly conducting a private right of action analysis. *See Villanueva v. Carere*, 85 F.3d 481, 486-487 (10th Cir. 1996); *City of Chicago v. Lindley*, 66 F.3d 819, 827-830 (7th Cir. 1995); *Larry P. by Lucille P. v. Riles*, 793 F.2d 969 (9th Cir. 1984); *New York Urban League, Inc. v. New York*, 71 F.3d 1031 (2d Cir. 1995). *Accord, Ferguson v. City of Charleston, South Carolina*, 186 F.3d 469, 480 & n.10 (4th Cir. 1999) (reviewing on the merits a "Title VI disparate impact claim").[12] Private actions have been permitted to proceed not only under Title VI regulations but under other federal regulations as well. App. 21a-22a, citing *Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242 (5th Cir. 1997) (Department of Education regulations under Title IX); *Robertson v. Dean Writter Rey-*

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[12] The Legislative Petitioners are incorrect that they are somehow deprived of the opportunity to present affirmative defenses in such an action. Leg. Pet. 23 n.18. Courts considering these cases routinely allow a defendant to respond to a prima facie case of racially disparate impact with a showing of "substantial legitimate justification." *Elston*, 997 F.2d at 1412. *Accord, Ferguson*, 186 F.3d at 480; *New York Urban League*, 71 F.3d at 1036.

nolds, Inc., 749 F.2d 530 (9th Cir. 1984) (Securities and Exchange Commission Rule 10b-16).

There simply is no split in the Circuits on the availability of prospective injunctive relief in federal court to enforce the Title VI regulations. No Court of Appeals has agreed with Petitioners' position, nor did either court below. The Legislative Petitioners also are incorrect in arguing that because Courts of Appeals describe in different terms the test used to determine whether a private right of action exists to enforce a federal regulation, a Circuit split exists that should be resolved by this Court. Leg. Pet. 14-17. That several Circuits have used differently worded analyses to reach the same conclusion does not constitute a Circuit split. Robert L. Stern, *et al.*, *Supreme Court Practice* 167 (7th ed. 1993) ("there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized").

Because, unlike *Chester Residents*, this case does not present the private right of action question as a stand-alone, dispositive issue, and because the Third Circuit was correct in any event (particularly considering the subsequent teaching of *Gebser*), certiorari should not be granted to review question two in the Petitions.

III. THE EXECUTIVE PETITIONERS' "GENERALLY WORDED REGULATION" QUESTION IS NOT WORTHY OF CERTIORARI.

In an argument not made to the District Court, Executive Petitioners suggest that subjecting their school funding scheme to scrutiny under a long-established federal regulation that bans racial discrimination raises "serious federalism concerns." Ex. Pet. 27. Petitioners seem to believe that Congress was not explicit enough in expressing its intent that the Department of Education should adopt a regulation ensuring that those who accept federal funds for their public school programs do not

administer those programs in a manner which discriminates against persons on the basis of race. Because of the alleged "generality" of the blanket prohibition on discrimination in both Title VI and the implementing regulation, Petitioners would have the Court insulate Petitioners' actions from challenge by both private parties and government agencies.

No principle of federalism justifies exempting public school education from the reach of the federal civil rights laws based on race. Petitioners' argument is built upon a misapplication of *Alexander* and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), neither of which involved racial discrimination. [13] The single footnote sentence in *Alexander*, which refers to "generally worded regulations" and is the basis of Petitioners' argument, states that in the absence of explicit statutory language to the contrary, this Court would not read into § 504 of the Rehabilitation Act of 1973 the requirement that states conduct a "Handicapped Impact Statement" similar to the "environmental impact statement" required under the National Environmental Policy Act. *Alexander*, 469 U.S. at 298-299, 307-308 n.32. No such "NEPA statement" requirement is sought in this case.

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[13] Petitioners support their claim that the Third Circuit's decision presents a threat to federalism with a "suggest[ion]" in an amicus brief filed by the United States in the district court that the regulation may require state officials to consider the special needs of urban school districts. Ex. Pet. 26. However, as the Third Circuit correctly observed, this case does not involve an attempt to obtain additional funding based on factors "external to the state subsidy program." App. 14a. Rather, this case involves a straightforward claim of racial discrimination inherent in the funding formula itself. *Id.*

IV. THE LEGISLATIVE PETITIONERS' CONTENTION THAT THE INJURY CLAIMED IS NOT REDRESSABLE MISCONSTRUES THE INJURY AND SHOULD NOT BE HEARD.

The Legislative Petitioners claim that Respondents' injury is not redressable because, if Pennsylvania were ordered to provide more money to the School District, local or federal sources might decide to decrease their contributions, thus leaving Respondents in the same position. Leg. Pet. 25-26. This argument misconstrues Respondents' injury. As the Third Circuit recognized, the injury alleged is not lack of adequate funding; rather, it is "that non-white school children in Pennsylvania receive less favorable treatment than their white counterparts because the state funds the school districts most of them attend at a lower level than it does the school districts most white school children attend." App. 28a. The injury is redressable because it will be remedied when Petitioners comply with the Title VI regulations and end differential treatment based on race. *Id.* *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), the case Legislative Petitioners cite to support their argument, Leg. Pet. 26-28, is inapposite because it presented a claim of taxpayer standing, not an allegation of discrimination by the named defendants.

In circumstances more similar to this case, this Court has refused to speculate about hypothetical future events that could affect the interests of the parties. *See, e.g., Federal Election Comm'n v. Akins*, 524 U.S. 11, 118 S. Ct. 1777, 1786-87 (1998) (injury was redressable although Federal Election Commission might later reach same result, noting "we cannot know that the FEC would have exercised its prosecutorial discretion in this way"); *United States v. Nixon*, 418 U.S. 683, 695-697 (1974) (claim was justiciable and Special Prosecutor had standing even though the President could fire the prosecutor). Indeed, in this case, the Complaint alleges and the Legislative Petitioners agree that the overall system

of public education, including the scope of local funding, is the State's system. App. 215a, ¶ 47; Leg. Pet. 2. That proposition must be accepted at this stage of the case; if Petitioners wish to contest it, the district court is the proper place to do so.

In any event, the Legislative Petitioners' redressability theory proves far too much, for under it any recipient of federal funds could engage in intentionally, blatantly racist behavior by providing a diminished program to minorities on the basis of race so long as the program has other funding streams that arguably could be cut to keep the program diminished. Redressability, when properly applied, is a shield to prevent court intervention where there is no case or controversy. Petitioners, however, would have it become a barrier to enforcement of a binding federal regulation as long as they can speculate about every conceivable decision of other actors which could eventually affect total funding under the state's system.

CONCLUSION

For all of the foregoing reasons, both Petitions for a writ of certiorari should be denied.

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Supreme Court of the United States

MATTHEW J. RYAN, ROBERT C. JUBELIRER, JESS M. STAIRS and JAMES J. RHOADES,

Petitioners,

vs.

DAVID POWELL, *et al.*,

Respondents.

and

THOMAS RIDGE, Governor of the Commonwealth of Pennsylvania, *et al.*,

Petitioners,

v.

DAVID POWELL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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INTEREST OF AMICI CURIAE

Amici Curiae State of Alabama and three other States submit this brief in support of Petitioners because they have been, and increasingly are being, made defendants in actions premised on the existence of an implied private right of action for disparate-impact claims under Title VI of the Civil Rights Act of 1964. As explained in greater detail below, such claims do not arise under the statute but, rather, under agency regulations. Only two Terms ago, this Court granted certiorari in *Seif v. Chester Residents Concerned for Quality Living*, No. 97-1620, to resolve whether Congress authorized such a private right of action. The *Chester Residents* parties suggested mootness, however, and certiorari was dismissed, forestalling a decision on this very important question. That dismissal of certiorari has not stopped the lawsuits against the States.

As the Ryan Petitioners note (Ryan Pet. 7), courts have issued decisions in cases that involve Title VI-based disparate-impact attacks on a wide variety of public policies. Among the recent such cases in which States were defendants are:

- The decision below, in which the plaintiffs alleged that Pennsylvania's system for funding public education had a disparate impact on racial minorities. *Powell v. Ridge*, Ryan Pet. App. 1a-34a. *See also Flores v. State of Arizona*, 48 F. Supp. 2d 937 (D. Ariz. 1999) (challenge to Arizona education funding system); *Cherokee Robinson v. Kansas*, No. 99-1193-JTM (D. Kan.) (pending challenge to Kansas' education funding system).

- A claim that the siting of a waste-water treatment facility had a disparate racial impact. *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *vacated and remanded with instructions to dismiss as moot*, 119 S. Ct. 22 (1998);

- A claim that Alabama violates Title VI by administering drivers license tests only in English. *Sandoval v. Hagan*, 7 F. Supp. 2d 1234 (M.D. Ala. 1998), *app. pending*, No. 98-6598 (11th Cir.);

- A disparate-impact challenge to the siting of a state highway project. *Bryant v. New Jersey Dep't of Transportation*, 987 F. Supp. 343 (D.N.J. 1998), *vacated in part*, 998 F.2d 438 (D.N.J. 1998);

- A pending disparate-impact challenge to a State's high-school exit examination. *GI Forum v. Texas Education Agency*, Civil Action No. SA-97-CA-1278-EP (W.D. Tex. July 27, 1999).

- A challenge to California's Proposition 227, an initiative that replaced bilingual education programs with programs designed to teach students with limited English proficiency in the English language. *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998).

These cases show that the concern this Court expressed in *Washington v. Davis*, 426 U.S. 229, 248 (1976), that disparate impact claims would threaten "a whole range of tax, welfare, public service, regulatory, and licensing statutes," is not misplaced. *See also Hernandez v. New York*, 500 U.S. 352, 374 (1991) (O'Connor, J., with Scalia, J., concurring in the judgment) (quoting *Washington v. Davis*).

The Third Circuit's decision not only raises a host of practical difficulties for the States, it has important federalism implications. The decision – and similar ones by several other federal courts of appeal – is inconsistent with the contractual theory of Spending Clause grants announced by this Court and permits the abrogation of States' Eleventh Amendment immunity based on rights created solely through agency regulations. The States have an abiding interest in ensuring that, to the extent the federal government can impose liability and damages remedies upon States, this be done by Congress rather than by federal agencies.

Accordingly, the *amici* States respectfully submit this brief in support of the Petitioners. This Court should grant the petitions to address the issue it agreed to review in *Chester Residents* and should close a loophole that is being exploited to the States' detriment.

ARGUMENT

PRIVATE DISPARATE-IMPACT CLAIMS ARE NOT AUTHORIZED BY TITLE VI AND IMPOSE SERIOUS FEDERALISM COSTS UPON THE STATES

Petitioners present several questions that are of the first order of magnitude. This amicus brief will address only one of those questions: whether there is an implied private right of action to enforce the disparate-impact regulations promulgated under Title VI. That question is mooted, of course, if the Court holds (as Petitioners request) that those regulations are invalid. If, however,

the Court chooses not to address the validity of the regulations or expressly upholds them, the existence *vel non* of a private right of action for disparate-impact claims becomes critically important. As shown below, there is no basis upon which to hold that Congress intended to subject States to private disparate-impact actions pursuant to Title VI. Moreover, serious federalism problems are raised if federal agencies are permitted to impose new conditions on States in Spending Clause programs and subject States to private actions for conduct that Congress has not addressed.

A. Title VI Does Not Allow for the Implication of a Private Right of Action for Disparate-Impact Claims.

In *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Court cited four factors relevant in determining whether an implied private right of action exists: (1) whether the statute creates a federal right in favor of the plaintiff; (2) whether there is any legislative intent to create or deny such a remedy; (3) whether it is consistent with the purposes of the legislative scheme to imply such a remedy; and (4) whether the cause of action is one traditionally relegated to state law. Underlying all of these considerations is the fundamental question of "whether Congress intended to create a private right of action." *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1, 13 (1981). *See also Suter v. Artist M*, 503 U.S. 347, 364 (1992); *California v. Sierra Club*, 451 U.S. 287, 293 (1981).

Guiding the inquiry into congressional intent are separation of powers concerns and the need to take the

express terms of congressional enactments seriously. Thus, in *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989, 1996 (1998), the Court noted that the inquiry "inherently entails a degree of speculation," and endeavored to "ensure that we do not fashion the parameters of an implied right of action in a manner at odds with the statutory structure and purpose." Evaluation of the structure and purpose of Title VI demonstrate that it would be error for this Court to imply a cause of action under the disparate impact regulations.

This Court has consistently held that Title VI prohibits only intentional discrimination by recipients of federal financial assistance, *see Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 287, 328-40 (1978), and courts have held that there is an implied private right of action to enforce that bar on intentional discrimination. *See Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979). ("[W]e have no doubt that Congress . . . understood Title VI as authorizing an implied private cause of action for the prohibited discrimination.") The latter holding in no way resolves the question presented to this Court. It is one thing to find an implied private right of action to enforce a federal statute that prohibits unconstitutional conduct. *Cf. United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992) ("[T]he reach of Title VI's protection extends no further than the Fourteenth Amendment.") It is a far different thing to find an implied private right of action to enforce agency regulations that vastly expand the liability imposed by the federal statute that authorizes their promulgation. *Cf.* 42 U.S.C. § 2000d-1 (Federal agencies are authorized and

directed to "effectuate the provisions of section 2000d . . . by regulation").

Agency regulations that prohibit disparate impact go beyond what Congress prohibited. While Congress prohibited only unconstitutional intentional discrimination in Title VI, the agency regulations bar conduct that is not unconstitutional. Evidence of disparate impact alone does not establish a constitutional violation. *See, e.g., Washington v. Davis*, 426 U.S. 229, 246 (1976). In addition, different states of mind are involved in that intentional discrimination requires a showing of discriminatory purpose, something that disparate impact does not. *See, e.g., Massachusetts v. Feeney*, 42 U.S. 256, 279 (1979) (" 'Discriminatory purpose' implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group.")

Simply put, if Congress expressed no intent as to disparate-impact claims, there is no basis upon which to find that Congress intended to allow a private right of action to enforce disparate impact claims. The fundamental difference between intentional discrimination, which is all that Congress prohibited, and disparate impact supports this conclusion.

This fairly obvious conclusion is further buttressed by the structure of Title VI. Section 602 of the Civil Rights Act of 1964 – under which the disparate-impact regulations were promulgated – establishes a comprehensive agency enforcement system. Agencies may enforce compliance with their regulations by "terminat[ing]" or

"refus[ing] to grant or continue . . . assistance" or by any other lawful means. 42 U.S.C. § 2000d-1. Termination of funding must follow an opportunity for hearing and notice to Congress, and does not become effective until thirty days after notice to Congress. *Id.* The creation of an agency remedy and the absence of any mention of a private right are powerful indications of Congress's intent. *See Gebser*, 118 S. Ct. at 1999 (presence of an express administrative remedy that includes notice to Title IX grantees makes it "unsound" to imply a judicial remedy based on absence of actual notice).

There are important structural differences between the agency remedies specified in Section 602 and private rights of action. Those private actions are not subject to the restraint imposed by Congressional oversight. When federal agencies are required to provide notice to Congress and wait for 30 days before acting, those agencies must make certain that any conditions they wish to impose on a recipient of federal funds conform to Congress's understanding of the law. In contrast, private plaintiffs are free to attempt to reengineer State policies without any such check. Congress, however, specified agency notice, but said nothing about private actions.

Implying a private right of action for disparate-impact claims also is inconsistent with the contractual nature of Title VI. This Court has explained that:

> The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is

> unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst State School v. Halderman, 451 U.S. 1, 17 (1981) (internal citations and footnote omitted). More recently, in *Gebser*, this Court observed that the contractual theory of grants has "implications for our construction of the scope of available remedies." 118 S. Ct. at 1998. Among other things, funds are given to recipients for specific purposes. The obligations imposed as the result of private actions divert funds from those specified purposes, and the related costs may exceed the funding provided. *See Gebser*, 119 S. Ct. at 1999.

Congress most certainly has not spoken "with a clear voice" regarding disparate-impact claims and, more specifically, private rights of action to enforce such claims. To the contrary, this Court has concluded that Congress did not speak to disparate-impact claims at all. *See* cases cited *supra* at 5. If the test is what Congress envisioned the States' liability to private parties would be, once again the result is clear: there is no basis upon which to conclude that Congress "envisioned" States being subjected to private actions asserting that State programs have a disparate impact.

Likewise, this Court has neither expressly nor impliedly held that there is an implied private right of action

under the disparate-impact regulations. In particular, neither *Guardians Assn. v. Civil Service Comm'n of New York*, 463 U.S. 582 (1983), nor *Alexander v. Choate*, 469 U.S. 287 (1985), supports the implication of a private right of action to enforce the regulations. In *Guardians*, this Court affirmed the denial of compensatory relief to plaintiffs in a Title VI lawsuit, reaching two conclusions as it did so. First, seven members of the Court agreed that proof of discriminatory intent is required to establish a violation of Title VI. 463 U.S. at 607 n.1 (Opinion of Powell, J.). Second, five members of the Court joined "to form a majority for upholding the *validity* of the regulations incorporating a disparate impact standard." *Id.* at 607 n.27 (Opinion of White, J.) (emphasis added); *see also id.* at 584 n.2. In *Alexander*, the Court confirmed this reading of *Guardians*. 469 U.S. at 292-93. Any uncertainty has been dispelled by *Fordice*, in which the Court rejected an attempt by private petitioners to assert a claim regarding affirmative action required by Title VI regulations, noting, "Our cases make clear . . . that the reach of Title VI's protection extends no further than the Fourteenth Amendment." *Id.*, 505 U.S. at 732 n.7.

B. Implying Private Disparate-Impact Claims Against States Creates a Host of Federalism Problems

The Spending Clause remains a significant loophole to the rule that the federal government "may not compel the States to enact or administer a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997). For this reason, it is critical that Spending Clause contracts between the federal government and States be

interpreted according to the plain terms of those contracts. Under the approach taken by the Third Circuit and many other courts of appeal, however, those contracts can be rewritten after-the-fact by federal agencies. That is a terribly one-sided means of interpreting a contract.

Moreover, private actions are not even subject to the constraints that limit the actions of federal agencies. As noted, when a federal agency wishes to sanction a State for administering a Spending Clause program in a manner that has a disparate impact, the agency must account to the committees of the House and Senate with legislative jurisdiction. That requirement restrains federal agencies because it makes them show that any sanctions they wish to impose on a grantee are consistent with Congress's understanding of the law. Any agency funding actions are limited, however, by both process and political checks. By contrast, private plaintiffs are unburdened by that scheme and by the give-and-take of the political process. Plaintiffs who disagree with politically adopted state policies have, increasingly, used these generally-worded disparate-impact regulations to trump political decisions.

The lawsuits themselves tell the tale. In *Chester Residents* and *Bryant*, the plaintiffs sought to use the courts to block construction of a waste-water treatment facility and a highway, respectively. Those facilities cannot be placed in any location, and the process of siting them generates NIMBY ("Not in my back yard") fights. The plaintiffs in *Chester Residents* and *Bryant* lost their NIMBY battles, but took a second bite at the apple with their Title VI lawsuits. These lawsuits thus stall or divert needed projects to the detriment of the State's waterways when a waste-

water treatment facility is delayed and the general driving public when the highway project is stalled.

The education lawsuits are similar attempts to use the federal courts to dictate state policy. *Powell* and *Cherokee Robinson* involve challenges to state school funding systems. The Ridge and Ryan Petitioners show that the Pennsylvania system is statutory and includes a state subsidy that includes consideration of the number of children in low-income families residing in the district. *See, e.g.*, Ryan Pet. 3. The Ryan Petitioners point out, "Philadelphia . . . has 12 percent of the Commonwealth's public school children yet receives about 18 percent of the total state subsidy for basic education. . . . If the subsidy were given on a flat, per-student basis, Philadelphia would obviously get less." *Id.*, at 3 n.6. Systems like Pennsylvania's that distribute federal, state, and local funds according to a statutory formula are not the result of intentional discrimination. Rather, they are the inherently political products of the interaction between the state executive and legislative branches.

Such uses of the federal courts not only frustrate the political process but also threaten interests protected by the Eleventh Amendment. It is axiomatic under Eleventh Amendment jurisprudence that *Congress* is the entity that can abrogate the States' immunity. Congress has done that for intentional discrimination and only for intentional discrimination. The Third Circuit's ruling approves of *federal agencies* abrogating the States' sovereign immunity from private actions alleging disparate-impact claims. This is a significant leap, and one that is flatly inconsistent with a host of decisions by this Court that require Congress to speak in unmistakably clear language

before a statute will be interpreted to abrogate the States' immunity. *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996) ("Congress' intent to abrogate the States' immunity from suit must be obvious from a clear legislative statement.") (internal quotation omitted); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (Setting forth a "clear statement" rule in the Tenth Amendment context); *Atascadero State Hospital v. Scanlon*, 473 U.S. 224 (1985) (Clear and unambiguous abrogation of immunity required in Eleventh Amendment context).

CONCLUSION

For the reasons stated in the Ridge and Ryan Petitions and in this amicus brief, this Court should grant the writ of certiorari and, on review, reverse the decision of the Third Circuit Court of Appeals.

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No. 99-527

In The Supreme Court of the United States

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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INTERESTS OF AMICUS CURIAE[1]

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters nationwide. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise principles, and a limited and accountable government. To that end, WLF has appeared before this and other federal and state courts in numerous cases involving excessive and unlawful government regulation.

In particular, WLF has regularly appeared before this Court and other appellate courts in cases interpreting our nation's civil rights laws and the Equal Protection Clause of the U.S. Constitution. *See, e.g., Bush v. Vera*, 517 U.S. 952 (1996); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). More importantly, WLF was the only amicus to file a brief supporting the petitioners in *Seif v. Chester Residents Concerned for Quality Living*, 118 S. Ct. 2296 (1998), *vacated as moot*, 119 S. Ct. 22 (1998). In *Chester*, while the petitioners argued that Congress did not intend to provide a private right of action under Title VI, WLF further argued that Title VI of the Civil Rights Act of 1964 only barred intentional discrimination. Consequently, the Title VI regulations at issue in *Chester*, the Environmental Protection Agency's Title VI

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[1] Pursuant to Supreme Court Rule 37.6, WLF hereby states that no counsel for a party in this case authored this brief in whole or in part, and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief. Counsel for the parties have consented to the filing of this amicus brief; those written consents have been filed with the Clerk. WLF also intends this brief as a support of the petitioners in *Ridge v. Powell*, No. 99-574, who were the state defendants in this underlying case, and whose petition presents essentially identical issues.

"Environmental Justice" regulations, were unlawful to the extent those regulations barred actions that had a discriminatory effect. In short, the issue WLF argued in *Chester* is identical to the one that is now squarely presented to the Court in this petition.[2] WLF thus brings a broader perspective to the issues in this case than that presented by the parties in this action.

STATEMENT OF THE CASE

In the interest of judicial economy, WLF hereby incorporates by reference the Statement contained in the Petition for a Writ of Certiorari.

In brief, the plaintiffs challenge the entire legislative system for funding public education in the Philadelphia School District and other school districts in Pennsylvania, arguing that the funding system has a discriminatory effect on minority students, and therefore, violated Title VI of the Civil Rights Act of 1964. The court of appeals held that the Section 602 of Title VI provided a private right of action, and that the regulations promulgated by the Department of Education prohibiting actions that have a discriminatory effect, 34 C.F.R. § 100.3(b)(2), were valid. In so ruling, the court of appeals essentially adopted the reasoning of its vacated decision in *Chester Residents*

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[2] WLF also supports the other two issues presented in the petition, particularly the question as to whether Congress intended to create a private right of action under Section 602 of Title VI. However, WLF will focus its brief on the first question presented regarding the validity of the discriminatory effect regulations.

Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997).

REASONS FOR GRANTING THE PETITION

I. WHETHER SECTION 602 OF TITLE VI AUTHORIZES FEDERAL AGENCIES TO PROMULGATE DISCRIMINATORY EFFECT REGULATIONS IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT

This case presents an important question concerning whether a federal agency may validly promulgate a regulation under Section 602 of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d-1, using a discriminatory effect standard when the statutory and constitutional authority under which the agency acts reaches only cases of intentional discrimination. This Court has yet to squarely address that question, although it has made statements in several decisions which have led lower courts, such as the Third Circuit below, to erroneously surmise that a federal agency may do so.

In particular, the Third Circuit and numerous other lower federal courts have wrongly interpreted this Court's decisions in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), and *Alexander v. Choate*, 469 U.S. 287 (1985), as holding that agency regulations under Title VI which incorporate a discriminatory effect standard are valid. So pervasive is the error warranting this Court's review that eight other federal courts of appeal have assumed that such agency regulations are valid, even though this Court has never squarely addressed the issue.

Most recently, in *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992), this Court noted that agency regulations under Title VI did *not* extend beyond the protection provided by the Fourteenth Amendment, but the Third Circuit ignored this Court's admonition under the mistaken belief that the Court had settled the issue in *Guardians* and *Alexander*. Because federal agencies may not issue Title VI regulations incorporating a discriminatory effect test, the Third Circuit clearly erred in finding a private right of action to enforce such regulations.

Therefore, absent this Court's review, lower federal courts will continue to erroneously allow federal agencies to engage in a lawmaking function by extending Title VI prohibitions to allegations of discriminatory effect. This would represent a dramatic and unwarranted expansion of federal agency power to determine what types of allegedly discriminatory conduct warrant legal proscription.

Because Title VI applies broadly to "every Federal department and agency which is empowered to extend Federal financial assistance to any program or activity," the potential impact of this issue is substantial. Numerous federal agencies, in addition to the Department of Education, have promulgated discriminatory effect regulations, ostensibly pursuant to Title VI. For example, the Environmental Protection Agency's Title VI regulations, 40 C.F.R. § 7.35(b), prohibit State environmental authorities from issuing permits to companies that wish to locate and operate their facilities in geographical areas that may have a discriminatory effect on minorities. Thus, even if the company meets or exceeds all federal and state pollution standards and requirements, the mere siting of the plant in a minority area could violate the EPA's controversial and vague "Environmental Justice"

regulations. *See also* 10 C.F.R. §§ 4.12(b), (c) (Department of Energy); 24 C.F.R. § 1.4(b)(2)(i) (Department of Housing and Urban Development); 49 C.F.R. § 21.5(b)(2) (Department of Transportation).

II. THE COURT OF APPEALS MISINTERPRETED THIS COURT'S *GUARDIANS* AND *ALEXANDER* DECISIONS

The court of appeals erroneously assumed, based upon a misreading of this Court's prior decisions, that discriminatory effect regulations promulgated by agencies pursuant to Section 602 of Title VI are valid exercises of their authority. As will be seen, this Court has not so held, and, in fact, a recent decision of this Court has cast this proposition into considerable doubt.

Consideration of whether the Department of Education (DOE) could validly incorporate a discriminatory effect standard must begin with the Constitution and the agency's statutory authority, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*[3] This Court has held

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[3] Section 601 of Title VI provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d).

Section 602 of Title VI provides, in pertinent part, that:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or

that the Fourteenth Amendment to the Constitution prohibits only instances of intentional discrimination, and does not prohibit instances of discriminatory effect. *Washington v. Davis*, 426 U.S. 229 (1976). In turn, this Court has likewise determined that Title VI's protection extends no further than the Fourteenth Amendment, and thus, Title VI itself does not prohibit instances of discriminatory effect. *Fordice*, 505 U.S. at 732 n.7; *Guardians*, 463 U.S. at 608, n.1 (Powell, J., concurring); *Regents of Univ. of California v. Bakke*, 438 U.S. 281, 284-87 (1978). Thus, as the Third Circuit acknowledged, both the Constitution and Title VI itself, which provided the authority for the DOE regulations at issue, protect only against instances of discriminatory intent.

Having properly acknowledged the limited scope of protection provided by the Constitution and the relevant statutory authority, the Third Circuit then embarked on a misguided analytical detour, based on a misreading of this Court's decisions. The Third Circuit reasoned, as it did in its vacated *Chester* decision, that this Court's decisions in *Guardians* and *Alexander* held that an agency's discriminatory effect regulation under section 602 is a valid exercise of its authority. However, properly read, neither

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> activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. § 2000d-1.

of these decisions encompass such a broad and erroneous holding.

Indeed, as the Third Circuit acknowledged, *Guardians* did *not* answer whether a private right of action exists under discriminatory effect regulations promulgated under section 602. *Guardians* involved an allegation that a last hired-first fired policy for lay-offs of police officers had a disproportionate effect on black and Hispanic police officers because officers were hired in order of their examination scores, and the examinations allegedly discriminated against minorities. *Guardians*, 463 U.S. at 584-85. The plaintiffs alleged that the policy violated Titles VI and VII of the Civil Rights Act, as well as the Fourteenth Amendment and other laws. *Id.* at 586. As to the claim for relief under Title VI, the Second Circuit had denied relief on the grounds that proof of discriminatory intent was required. *Id.* at 588. This Court rendered a deeply divided decision which affirmed the Second Circuit's *denial* of relief under Title VI.

The Third Circuit in this case misread *Guardians* as "holding" that discriminatory effect regulations are valid exercises of their authority. To the contrary, a plurality of four justices in *Guardians* stated that discriminatory effect regulations were not a valid exercise of agency power. *Id.* at 611, n.5 (Powell, J., concurring in judgment); *id.* at 612 (Rehnquist, J., concurring in judgment and joining in Part II of Justice Powell's opinion); *id.* at 614-15 (O'Connor, J., concurring in judgment). Three justices stated that discriminatory effect regulations were valid even though Title VI itself required discriminatory intent. *Id.* at 644-45 (Stevens, J, dissenting). Justice Marshall stated that a discriminatory effect standard was permissible under either Title VI or the agency regulations. *Id.* at 623-24

(Marshall, J., dissenting). Justice White stated that only noncompensatory, prospective relief was available under either Title VI or its regulations, and thus that the Second Circuit's denial of compensatory relief should be affirmed. *Id.* at 592-94. Justice White proceeded in *dictum* to state that a discriminatory effect standard was permissible under Title VI, but that *dictum* played no part in the Court's holding. *Id.* Properly read, the holding of *Guardians* is that there is no cause of action for compensatory damages for allegations of discriminatory effect under either Title VI or agency Title VI regulations, and the Third Circuit's suggestion of a broader holding is simply incorrect.

In support of its decision, the Third Circuit cited this Court's decision in *Alexander*, but, again, *Alexander* likewise contains no such holding, nor could it alter the limited holding of *Guardians* after the fact. *Alexander* did not involve Title VI, but rather the Rehabilitation Act. The plaintiffs in that case were Medicaid recipients who sought declaratory and injunctive relief from a state's reduction in the number of inpatient hospital days that the state's Medicaid program would pay on behalf of the recipients. *Alexander*, 469 U.S. at 289. The plaintiffs alleged that the state's reduction had a discriminatory effect on the handicapped and violated Section 504 of the federal Rehabilitation Act and its implementing regulations.

The unanimous and limited holding of this Court was that the plaintiffs' allegations were not cognizable under the Rehabilitation Act or its implementing regulations. *Id.* at 309. The Third Circuit read *Alexander* far more broadly, based upon the following passage from this Court's opinion, which stated:

> In *Guardians*, we confronted the question whether Title VI of the Civil Rights Act of 1964 * * * which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both intentional and disparate-impact discrimination. No opinion commanded a majority in *Guardians*, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, a two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. *In essence*, then, we held that Title VI had delegated to the agencies *in the first instance* the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

Alexander, 469 U.S. at 292-94 (emphasis added) (citation omitted).

Of course, as is made clear by the previous discussion of *Guardians*, that case did not "hold" that a disparate impact claim could be pursued through agency regulations under Title VI, and any discussion of that subject in *Guardians* was *dicta*. Moreover, this after-the-fact explanation of *Guardians* in *Alexander* was *dicta* twice over, as *Alexander* did not even involve a Title VI claim

and the discussion was irrelevant to the result in that case. Indeed, the *Alexander* Court reversed the lower court's ruling that the plaintiffs had established a prima facie violation of section 504.

Thus, the Third Circuit erred when it read this Court's decisions in *Guardians* and *Alexander* as binding precedent for the validity of agency discriminatory effect regulations. Further, since those decisions, this Court has not held that such regulations are valid. To the contrary, this Court's more recent statement in *Fordice* raises the question which the Court should address in this case, specifically, whether such discriminatory effect regulations are valid to the extent they purport to reach conduct not proscribed by Title VI and the Fourteenth Amendment.

In *Fordice*, this Court addressed the correct legal standard for evaluating a state's compliance with the Equal Protection Clause in the context of school desegregation. In particular, the Court considered the standard to be applied to determine if a state had eradicated policies and practices traceable to a history of *de jure* segregation in a public university system. *Fordice*, 505 U.S. at 723-24, 727-28.

In its opinion, this Court made the following statement with regard to the private plaintiffs' Title VI claim:

> Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, *citing a regulation* to that statute which requires States to "take affirmative action to overcome the effects of prior discrimination." *Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection*

> *extends no further than the Fourteenth Amendment.* We thus treat the issues in these cases as they are implicated under the Constitution.

Id. at 732, n.7 (emphasis added) (citations omitted).

The Third Circuit in *Chester* recognized the obvious implication of that statement, commenting: "[h]idden within the Court's statement may be an indication that implementing regulations, such as the EPA's, that incorporate a discriminatory effect standard are invalid, because they extend further than the Fourteenth Amendment." *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 931 n. 9 (3d Cir. 1997). However, the court dodged the statement's implications, which are assuredly not hidden, by stating, "we do not believe that the Court would overturn *Guardians* and *Alexander* in such an oblique manner." *Id.* Of course, as is clear from the previous discussion, there was no such holding in *Guardians* and *Alexander* which needed overturning. The Third Circuit simply misread the breadth of this Court's decisions in *Guardians* and *Alexander*, and failed to heed an obvious warning sign from this Court in *Fordice*.

Just as this Court has held that Title VI extends no further than the Fourteenth Amendment, similarly, an agency regulation such as that at issue in this case could extend no further. An administrative agency is not free to proscribe otherwise lawful conduct through a regulation simply because it can be said that the regulation arguably furthers one of the purposes of an enabling statute. Such policy judgments are for the Congress to decide, and when the Congress decides that a purpose of the statute will be

accomplished by proscribing certain conduct, a federal agency is not free to upset the congressional compromise by proscribing even more conduct in the name of furthering one of the statute's purposes. As Justice O'Connor stated in her concurring opinion in *Guardians*:

> An administrative agency is itself a creature of statute. Although the Court has stated that an agency's legislative regulations will be upheld if they are "reasonably related" to the purposes of the enabling statute * * * we would expand considerably the discretion and power of agencies were we to interpret "reasonably related" to permit agencies to proscribe conduct that Congress did not intend to prohibit. "Reasonably related to" simply cannot mean "inconsistent with."

Guardians, 463 U.S. at 614-15 (O'Connor, J., concurring).

This is not a case where room for agency discretion in defining the scope of prohibited conduct was necessary because it was impractical for Congress to enact specific limitations. Within constitutional limits, Congress could have determined that the dangers of discrimination warranted extending Title VI protections beyond instances of intentional discrimination. That it did not do so must be regarded by this Court as a deliberate policy choice, and not as a deferral to administrative agencies to make the decision instead. The difference between prohibiting discriminatory intent and discriminatory effect represents precisely the type of broad public policy decision which rests in the hands of our elected legislatures, and not administrative agencies.

This Court has determined that Congress, in enacting Title VI, intended to extend the Fourteenth Amendment's proscription of intentional discrimination by government to private parties receiving federal funds. *Bakke*, 438 U.S. at 284-87 ("[i]n view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment"); *see also id.* at 328-29 ("[t]he history of Title VI . . . reveals one fixed purpose: to give the Executive Branch of Government clear authority to terminate federal funding of private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government.") (Brennan, J., concurring in judgment and dissenting in part). Moreover, this Court noted that Congress' refusal to more specifically define "discrimination" in Title VI evidenced Congress' intent that the term was to be defined by the scope of the constitutional prohibition. *Id.* at 286-87. That being the case, it is certainly beyond the power of an administrative agency to extend the reach of the statute further.

Moreover, if this Court were to hold that Title VI, by authorizing federal agencies to "effectuate the provisions of section 2000d of this title" by issuing regulations "consistent with achievement of the objectives of the statute authorizing the financial assistance," delegated to agencies the decision-making authority to prohibit all manner of discriminatory effects when Title VI itself prohibited only instances of discriminatory intent, it would approve a dramatic delegation of Congress' lawmaking power in violation of the nondelegation doctrine. That doctrine continues to serve several essential purposes and is vital to ensuring that the power to make law cannot be exercised by anyone other than Congress. *See American Trucking*

Associations v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), *reh'g denied*, __ F.3d ___, (Oct. 29, 1999).

As Chief Justice Rehnquist stated in *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Institute*, 448 U.S. 607 (1980):

> First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Id. at 685-86 (Rehnquist, J., concurring) (citations omitted).

CONCLUSION

For these reasons and those stated in the respective petitions in this case, this Court should grant review of the lower court's decision in order to correct a serious error in the interpretation of Title VI and this Court's precedents.

Respectfully submitted.

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No. 99-527

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW J. RYAN, ROBERT C. JUBELIRER, JESS M. STAIRS and JAMES J. RHOADES,

Petitioners,

vs.

DAVID POWELL, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. THE PROPER SCOPE AND ENFORCEMENT OF TITLE VI REGULATIONS ARE CRITICAL ISSUES MERITING THIS COURT'S ATTENTION.

A. This case squarely raises the issues of whether Title VI disparate-impact regulations are valid and whether they are enforceable by private actions.

The opposition to the petition is perhaps most notable for what it does not say. Respondents tacitly concede that the first two issues in the petition – the validity of Title VI disparate-impact regulations and their susceptibility to private actions – are substantial and important questions meriting consideration by this Court.

Rather than challenging that basic – and indisputable – conclusion, Respondents attempt to re-cast their complaint and the decision of the Third Circuit in an effort to suggest that the complaint alleges something other than what it does. That attempt at legerdemain should fail.

The complaint begins with a preliminary statement that "Plaintiffs allege that Defendants have discriminated ***in effect*** . . ." Complaint at ¶ 1 (App. H to Petition in *Ridge* v *Powell* at 201a) (emphasis added). In Count I of their complaint, Respondents allege that

> 73. The Commonwealth Defendants' funding policies and practices wrongfully discriminate . . . ***by utilizing criteria and methods that have had the foreseeable effect of subjecting such students to***

> ***discrimination*** . . . in violation of the Title VI implementing regulations applicable to federal education programs. . .
>
> ***
>
> 75. The Commonwealth Defendants' funding policies and practices have had the foreseeable, racially discriminatory ***effect*** of further isolating the Student Plaintiffs. . .

Complaint (App. H to Petition in *Ridge* v *Powell* at 223a) (emphasis added). The complaint contains no allegation that any of the defendants purposefully discriminated against anyone. That the disparate impacts may have been "foreseeable" does not convert their complaint into one addressing purposeful or intentional discrimination. *See Personnel Administrator of Mass.* v *Feeney*, 442 U.S. 256, 279 (1979) (knowledge of potential result does not constitute purposeful discrimination).

Respondents describe the Third Circuit's decision as recognizing "that factual development of Respondents' allegations could result in a finding of intentional discrimination." Respondents' Brief at 12. That assertion misstates the Third Circuit's dictum. In a footnote, the court described a suggestion Respondents made at oral argument; it did not adopt that assertion as either a holding or a finding. *See Powell* v *Ridge*, Nos. 98-2096, 98-2157 (App. A at 7a, n.1) ("It appears that plaintiffs suggest that with discovery they may be able to make a case of intent under Title VI . . .").

In fact, the Third Circuit clearly understood Respondents to contend both in their complaint and at oral argument that they were claiming only a disparate impact. *Id.* (App. A at 7a, n.1) ("Plaintiffs should not be penalized

for their scrupulousness in declining to include allegations against public officials concerning conduct that they suspect but of which they currently have no direct proof."). The court of appeals recognized that the linchpin of this case is the disparate-impact claim. Thus, the court began its analysis by writing that "[t]he complaint challenged the practices of the Commonwealth of Pennsylvania in funding public education as having a racially discriminatory effect." *Id.* (App. A at 2a).[1]

Both the complaint and the decision of the court of appeals make clear that the claim of disparate-impact is at the heart of the allegations in this matter. Respondents' attempt to suggest otherwise at this late date underscores their own understanding that the disparate-impact issues are important for this Court's prompt review.

B. The opposition does not challenge the nationwide importance of the issues raised in the petition.

The principal basis on which Petitioners Ryan, *et al.*, urged the Court to grant review is the significant importance of the issues presented. The first two questions in the *Ryan* petition raise purely legal questions about the proper scope of administrative regulations under Title VI and whether those regulations may give rise to private enforcement actions.

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[1] The court of appeals repeatedly characterized the complaint as alleging an improper disparate impact. *See, e.g., Powell* v *Ridge*, Nos. 98-2096, 98-2157 (App. A at 15a-16a) ("The defendants in this case are on notice that plaintiffs intend to prove that their funding formula produced disparate effects, and the defendants are in as good a position as anybody to know precisely what that funding formula entails.").

Respondents tacitly concede that these are critically important questions that have not been answered by this Court. They do not – and cannot – dispute that more than 40 federal agencies have promulgated disparate-impact regulations with their genesis in Title VI and that those regulations affect almost every aspect of our society, from agriculture to the environment to education.

The importance of those core questions is sufficient enough reason for the Court to accept this case for review. Respondents counter that there is no split among the courts of appeals and, indeed, that is so. It is also immaterial.

The principal reason this Court grants *certiorari* to consider issues about which the courts of appeals are split is to bring uniformity to the interpretation of federal law. *See, e.g., McElroy* v *United States*, 455 U.S. 642, 643 (1982). But what of the situation where, as here, the courts of appeals are uniformly incorrect in their conclusions? A majority of the federal circuits have made known their conclusions that Title VI regulations may validly prohibit disparate impacts and that those regulations may be enforced by private actions. *See New York Urban League, Inc.* v *New York*, 71 F.3d 1031 (CA2 1995); *Powell* v *Ridge*, Nos. 98-2096 and 98-2157, 1999 U.S. App. LEXIS 20092 (CA3 1999); *Ferguson* v *City of Charleston*, 186 F.3d 469 (CA4 1999); *Castenada by Castenada* v *Pickard*, 781 F.2d 456 (CA5 1986); *Buchanan* v *City of Bolivar, Tenn.*, 99 F.3d 1352 (CA6 1996); *City of Chicago* v *Lindley*, 66 F.3d 819 (CA7 1995); *Larry P.* v *Riles*, 793 F.2d 969 (CA9 1984); *Villanueva* v *Carere*, 85 F.3d 481 (CA10 1996); and *Burton* v *City of Belle Glade*, 178 F.3d 1175 (CA11 1999).

There was likewise no circuit split on the issue when the Court granted the petition for a writ of *certiorari* in *Seif* v *Chester Residents Concerned for Quality Living*, 118 S.Ct. 2296 (1998). Still, the Court recognized the vast importance of the issue.

Now, nearly two years later, the developing caselaw in the lower federal courts has only served to underscore that importance. Respondents do not – and cannot – deny the significant number of cases still pending or recently decided in the federal courts in which Title VI regulations have been the focus. *See, e.g.*, *Sandoval* v *Hagan*, No. 98-6598 (CA11); *Bryant* v *New Jersey Department of Transportation*, No. 97-1397 (D.N.J.); *Flores* v *Arizona*, No. 92-596 (D. Ariz.); *South Bronx Coalition for Clean Air* v *Conroy*, No. 98 Civ. 4404 (S.D.N.Y.); *New York City Environmental Justice Alliance* v *Guiliani*, No. 99 Civ. 3330 (S.D.N.Y.); *Cureton* v *National Collegiate Athletic Association*, No. 97-131 (E.D. Pa.); *Maryland State Conference of NAACP Branches* v *Maryland Department of State Police*, No. CCB-98-1098 (D. Md.); *Cherokee Robinson* v *Kansas*, No. 99-1193 (D. Kan.); and cases cited on the previous page.

This Court has never squarely decided whether disparate-impact regulations exceed the scope of Title VI and it has never addressed at all whether those regulations, if valid, may support private actions.[2] It should accept this opportunity to resolve both questions.

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[2] As noted in the *Ryan* petition, to the extent the Court addressed the validity of Title VI regulations in *Guardians Ass'n* v *Civil Service Comm'n*, 463 U.S. 582 (1983), the Court reached no holding. Moreover, the splintered decision in *Guardians* has unfortunately generated more confusion than it has resolved.

II. RESPONDENTS' SUGGESTION THAT THIS CASE IS NOT RIPE FOR CERTIORARI IGNORES BOTH THE TRUE POSTURE OF THE CASE AND THE COURT'S PRACTICE.

Respondents argue in their opposition brief that this case is not ripe for this Court's consideration because there has not yet been a final judgment below.

This Court has not hesitated to review cases in which the courts of appeals have construed purely legal questions and then remanded the cases to the district courts. *See, e.g., United States* v *General Motors Corporation*, 323 U.S. 373, 377 (1945); and *Land* v *Dollar*, 330 U.S. 731, 734 n.2 (1947). In both *General Motors* and *Land*, the Court explained that review was appropriate because the decision of the court of appeals involved an issue "fundamental to the further conduct of the case." *General Motors*, 323 U.S. at 377; *Land*, 330 U.S. at 734 n.2.

As noted in the first section of this reply brief, no matter how urgently Respondents attempt to re-package their assertions, they cannot avoid one fundamental point: the linchpin of their complaint is their claim that the Pennsylvania school-funding formula results in a disparate impact upon members of minority groups. The issues raised in the petition regarding the disparate-impact regulations are "fundamental to the further conduct of the case." *General Motors*, 323 U.S. at 373. Discovery in this case could be protracted and costly, dealing as it likely will with difficult statistical and sociological analyses. While that process will impose significant expense and burden on all parties, the purely legal issues raised in the petition will not change. They are ripe for review now, and immediate review will serve the purposes of the parties to this case as

well as those of the parties to other Title VI regulation cases pending nationwide.

There is strong – and recent – precedent for the Court to take the case in its present procedural posture. For example, consider *Chester Residents*, the case in which the Court agreed to consider one of the same issues presented in this case. In that case, the district court granted a motion to dismiss the complaint. The Third Circuit reversed and remanded for further proceedings. *Chester Residents Concerned for Quality Living* v *Seif*, 132 F.3d 925 (CA3 1997).[3] The defendants filed a petition for a writ of *certiorari* and this Court granted it. This case is now in the same procedural posture as *Chester Residents* was in at the time the Court accepted review of that case.

In *Blessing* v *Freestone*, 520 U.S. 329 (1997), the district court held that the federal statute at issue did not give rise to an right enforceable by a Section 1983 action. A divided panel of the Ninth Circuit reversed, held that the statute did provide a private right of action, and remanded the matter to the district court for further proceedings. At that procedural juncture, the Court granted *certiorari* and reversed the Ninth Circuit's decision.

Indeed, at least three cases on the Court's docket in the current Term are similarly situated.

In *Shalala* v *Illinois Council on Long Term Care*, No. 98-1109, the district court dismissed the complaint on

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[3] The Third Circuit wrote that "we will reverse and remand for further proceedings, including a consideration of the remaining grounds for dismissal contained in defendants' Motion to Dismiss." 132 F.3d at 937.

jurisdictional grounds. The Seventh Circuit vacated the dismissal and remanded the case for further proceedings. *See Illinois Council on Long Term Care* v *Shalala*, 143 F.3d 1072 (CA7 1998). The court of appeals' remand order did not prevent this Court from granting review.

In *Willowbrook, IL* v *Olech*, No. 98-1288, the district court dismissed the complaint for failure to state a claim. The Seventh Circuit reversed and remanded for further proceedings. *See Olech* v *Willowbrook*, 160 F.3d 387 (CA7 1998). Nonetheless, this Court granted a petition for a writ of *certiorari* to review the Seventh Circuit's decision.

In *Pegram* v *Herdrich*, No. 98-1949, the district court granted a motion to dismiss after it determined that the plaintiff had failed to state a claim under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* The court of appeals disagreed, reversed, and remanded the case for discovery. *See Herdrich* v *Pegram*, 154 F.3d 362 (CA7 1998). With the case in that posture, this Court granted a petition for a writ of *certiorari* to consider the purely legal question decided by the court of appeals.

The bottom line is that, confronted with particularly important legal issues, this Court has regularly accepted review of cases in precisely the same procedural posture as this case. There is no impediment to a prompt consideration.[4]

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[4] Respondents argue that the question of whether Title VI regulations can give rise to private actions would not be dispositive of this case because the second count of their complaint pleads a Section 1983 claim. Their assertion is misguided. First, the petition raises as

III. THE COURT SHOULD REVIEW THE STANDING ISSUE RAISED IN THE PETITION BECAUSE IT PRESENTS AN IMPORTANT ISSUE OF FIRST IMPRESSION.

The petition asserted that this case presents a standing issue of first impression for this Court. Respondents do not question that assertion.

Respondents contend that this case is distinguishable from *Asarco, Inc.* v *Kadish*, 490 U.S. 605 (1989), because that case concerned taxpayer standing while this case concerns an allegation of discrimination. Unfortunately, Respondents do not explain why they believe this distinction to be material, and in fact it is not. As noted in the petition, *Asarco* stands for the rule that, where the remediation of the plaintiff's asserted injury rests on the unfettered choices of third parties not before the court, the injury is not redressable as required for Article-III standing. Here, Respondents complain of an array of ills that all stem from lack of funding for the School District of Philadelphia. They do not dispute that approximately half of the funding for the school district is provided by the City of Philadelphia, which is a plaintiff, or by the federal government, which is not a party. That scenario provides the Court with an opportunity to consider

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its first issue the validity of the regulation itself, an issue that would be case dispositive (the Section 1983 claim in the complaint could not proceed were the regulation invalid). Second, the Court has often taken cases that raise important federal issues even if there are other issues in the case. *See, e.g., City of Boerne* v *Flores*, 521 U.S. 507 (1997) (considering the constitutionality of the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb, *et seq.*, although "[t]he complaint contained various claims. . .")

the rule in *Asarco* in a slightly different, but no less important, setting.

Respondents correctly note that the standing inquiry is a subpart of the Article-III case or controversy requirement. One of that requirement's principal goals is to insure that the federal courts do not render decisions that are, in fact, merely advisory opinions without effect in the real world and in the affairs of the parties. Because of the wholly speculative nature of Respondents' claim that an injunction directed only to the executive officers of the Commonwealth of Pennsylvania would redress the injuries claimed in the complaint, there is a substantial reason for this Court to question whether this matter presents a proper case or controversy for resolution by the federal courts.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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